

Fall 2001

Inheriting the Storied Pomp of Ancient Lands: An Analysis of the Application of Federal Immigration Law on the United States' Northern and Southern Borders

Catherine E. Halliday

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Catherine E. Halliday, *Inheriting the Storied Pomp of Ancient Lands: An Analysis of the Application of Federal Immigration Law on the United States' Northern and Southern Borders*, 36 Val. U. L. Rev. 181 (2001).

Available at: <https://scholar.valpo.edu/vulr/vol36/iss1/4>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



INHERITING THE STORIED POMP OF ANCIENT LANDS:

AN ANALYSIS OF THE APPLICATION OF FEDERAL IMMIGRATION LAW ON THE UNITED STATES' NORTHERN AND SOUTHERN BORDERS

*Not like the brazen giant of Greek fame,
With conquering limbs astride from land to land;
Here at our sea-washed, sunset gates shall stand
A mighty woman with a torch, whose flame
Is the imprisoned lightning, and her name
Mother of Exiles. From her beacon-hand
Glows world-wide welcome; her mild eyes command
The air-bridged harbor that twin cities frame.
"Keep, ancient lands, your storied pomp!" cries she
With silent lips. "Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!"¹*

I. INTRODUCTION

Prior to the nineteenth century, the United States maintained a policy of open borders with no legal restrictions on immigration, remaining faithful to the Statue of Liberty's welcoming words.² The

¹ 7 ENCYCLOPAEDIA BRITANNICA 332 (15th ed. 1992). Emma Lazarus' sonnet, *The New Colossus*, is inscribed on the Statue of Liberty's bronze pedestal, welcoming immigrants to the United States' major immigration station of the 1800s. *Id.*

² *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 n.15 (1952) ("An open door to the immigrant was the early federal policy."); EDWIN HARWOOD, IN LIBERTY'S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 2 (1986) ("During the era of open immigration in the nineteenth century, aliens simply arrived on our shores, found lodging and jobs, and were assimilated by degrees into society."); WILLIAM C. VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 3 (1932); Minty Siu Chung, *United States Immigration Policy, A History of Prejudice and Economic Scapegoatism?: Proposition 187: A Beginner's Tour Through a Recurring Nightmare*, 1 U.C. DAVIS J. INT'L L. &

182 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

liberal border policy reflected the young country's desire to encourage foreigners to settle its frontiers and satisfy its large demand for labor.³ The policy also reflected the federal government's uncertainty regarding its ability to regulate immigration under the Constitution.⁴

Nonetheless, growing anti-immigrant sentiment, fueled by economic depression, soon prompted a shift in border policies, beginning more than a century of inconsistent immigration law.⁵ The United States

POL'Y 267, 276 (1995); Melinda Smith, *Criminal Defense Attorneys and Noncitizen Clients: Understanding Immigrants, Basic Immigration Law & How Recent Changes in Those Laws May Affect Your Criminal Status*, 33 AKRON L. REV. 163, 165 (1999) [hereinafter Smith, *Criminal*]; Jan C. Ting, "Other Than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 302 (1995) ("Not only was anyone in the world welcome to come to America, but the need for labor was so great that some people who did not want to immigrate would be forced to do so against their will, in the most cruel and inhuman circumstances."); David Ziskind & Esther Horney, *Laws Affecting Migratory Labor: United States, Mexico, and Canada*, 4 COMP. LAB L.J. 1, 2 (1981) ("For the first 100 years of U.S. history, all migrants were welcome, but during the next century, laws selectively inhibited their flow.").

³ Lora L. Grandrath, Note, *Illegal Immigrants and Public Education: Is There a Right to the 3 Rs?*, 30 VAL. U. L. REV. 749, 755 (1996); Ting, *supra* note 2, at 302; Katherine L. Vaughns, *Retooling the "Refugee" Definition: The New Immigration Reform Law's Impact on United States Domestic Asylum Policy*, 1 RUTGERS RACE & L. REV. 41, 48 (1998).

⁴ Grandrath, *supra* note 3, at 755 ("First, for approximately 100 years, it had not been determined whether the Constitution empowered the federal government to regulate immigration."); see also VAN VLECK, *supra* note 2, at 3; Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1628 (1997) (referring to the "federal legislative vacuum" with respect to immigration until the end of the nineteenth century).

⁵ Ting, *supra* note 2, at 302. The open border policy towards immigration changed "when Congress became aware of a clamor in the western United States against immigrants from China." *Id.* Chinese immigration began to grow due to the California Gold Rush of the late 1840s. *Id.* It continued to grow significantly after the Civil War because the United States needed Chinese laborers for the railroads' expansion and construction. *Id.* When the transcontinental railroad was completed and the Gold Rush ended, Chinese laborers were no longer in demand. *Id.* They became the subjects of attack and persecution after the Panic of 1873, the Depression of 1877, and drought created anti-immigrant fervor in the West. *Id.* at 302. The common belief that the Chinese were criminals and prostitutes led to the first federal law to bar immigration; the Act barred both criminals and prostitutes from entry. *Id.*; see also Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 U.C.L.A. L. REV. 1425, 1450 (1995). Hostility toward immigrants is fueled partly by economic woes. Neuman, *supra*, at 1450. Xenophobia and nativism also contribute to the fear of foreigners. *Id.* at 1428. Xenophobia is an inflated fear of foreign persons. *Id.* Even in a country of immigrants, xenophobia is a widespread human characteristic; some authors have concluded that human beings are genetically predisposed to it. *Id.* "It is no coincidence that we still refer to noncitizens as 'aliens,' a term that calls attention to their 'otherness,' and even associates them with nonhuman invaders from outer space." *Id.* Nativism is a subcategory of xenophobia that results in a fear of an internal minority due to its foreign connections, seeing the minority's members as marked enemies of an American lifestyle. *Id.*

passed the first federal statutes restricting immigration in 1875 and 1882 in response to economic stagnation and citizens' growing distrust of immigrants.⁶ Congress continued to stringently regulate immigration until World War II, when labor shortages once again inspired the country to open its borders and welcome immigrant workers.⁷ However, the United States refocused on preventing illegal immigration after the troops returned from battle and reentered the workforce.⁸ Current immigration law continues the inconsistent policies.⁹ In order to pacify the southern states' hostile reaction to growing illegal immigrant populations, the United States has fortified the Mexican border while relaxing enforcement on the Canadian border.¹⁰ Consequently, the

⁶ Ting, *supra* note 2, at 301-02. Immigrants became the subject of hostility and persecution when the end of the Gold Rush and the completion of the transcontinental railroad curtailed the demand for labor. *Id.* at 302. Then, the Panic of 1873, the Depression of 1877, and drought created an "anti-alien" fervor in the West. *Id.*; see also Vaughns, *supra* note 3, at 50.

⁷ HARWOOD, *supra* note 2, at 4 ("This cycle of first an open and then a closed door at the southern border repeated itself again during and after World War II, when wartime demand for workers led to . . . a more relaxed attitude toward enforcing the law against illegal entrants . . ."); Jesus A. Trevino, *Border Violence Against Illegal Immigrants and the Need to Change the Border Patrol's Current Complaint Review Process*, 21 Hous. J. Int'l L. 85, 89 (1998) ("Little attention was given during this time to the flow of illegal immigrants who came to America and helped offset the labor shortage due to the war."); see also KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 1 (1992) ("Mexican workers were the first installment of a wartime emergency program designed to fill the declared labor shortage in agriculture.").

⁸ HARWOOD, *supra* note 2, at 5 ("[T]he Korean truce had been signed and defense contracts were declining just as veterans were beginning to return to the labor market . . . Many officials felt it was time to reaffirm the country's sovereign right to control admissions."); Trevino, *supra* note 7, at 89 (explaining that the Immigration and Naturalization Service ("INS") "launched Operation Wetback . . . to expel the thousands of undocumented Mexican workers that the United States encouraged to cross over the border during World War II.").

⁹ See *infra* Part II (discussing immigration law's inconsistent policies).

¹⁰ See *infra* Part II.C; see also Ross Ramsey & James Pinkerton, *Texas to Join Federal Suit to Recoup Immigrant Cost*, Hous. Chron., May 27, 1994, at A1 (describing a California, Florida, and Texas lawsuit against the federal government to recoup costs incurred as a result of illegal immigrants); *The Unfair Immigration Burden*, N.Y. Times, Jan. 11, 1994, at A20 (supporting the states' suit against Washington for reimbursement for illegal immigrant costs); Daniel B. Wood, *Legal Fight Over Illegal Aliens*, THE CHRISTIAN SCI. MONITOR, May 12, 1994, at 1 (detailing Florida, California, and Arizona's suits against the federal government for illegal immigration expenses, and revealing plans for New York, New Jersey, and Texas to sue). Proposition 187, voted into law by California citizens, mandated the denial of health care, education and social services to undocumented immigrants and stated in part:

§ 48215. Exclusion of Illegal Aliens from Public Elementary and Secondary Schools

(a) No public elementary or secondary school shall admit, or permit the attendance of, any child who is not a citizen of the United States, an

184 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

federal government is selectively enforcing its laws against immigrants of Mexican origin, raising significant equal protection concerns.¹¹

Woody Guthrie, a folk artist, captured the United States' ambivalent attitude toward immigration with his lyrics in *Deportee*, written less than a century after the United States first began to regulate its borders: "The crops are all in and the peaches are rotting. The oranges are packed in their creosote dumps. You're flying them back to the Mexican border. To spend all their money, to wade back again."¹² The song accurately

alien lawfully admitted as a permanent resident, or a person who is otherwise authorized under federal law to be present in the United States.

§ 130. Exclusion of Illegal Aliens from Publicly Funded Health Care
In order to carry out the intention of the People of California that, excepting emergency medical care as required by federal law, only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of publicly-funded health care, and to ensure that all persons employed in the providing of those services shall diligently protect public funds from misuse, the provisions of this section are adopted.

§ 10001.5. Exclusion of Illegal Aliens from Public Social Services
(a) In order to carry out the intention of the People of California that only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of public social services and to ensure that all persons employed in the providing of those services shall diligently protect public funds from misuse, the provisions of this section are adopted.

Proposition 187, §§ 2-9 (enacting CAL. EDUC. CODE §§ 48215 and 66010.8, CAL. GOVT. CODE § 53069.65, CAL. HEALTH & SAFETY CODE § 130, CAL. PENAL CODE §§ 113, 114, and 834b, and CAL. WELF. & INST. CODE § 10001.5). *But see* Pamela Constable & D'Vera Cohn, *Immigrants: More Boon than Burden; Woven into Economic Fabric is Strength of Foreign Threads*, THE WASH. POST, Aug. 31, 1998, at A1 ("The most comprehensive immigration study yet, released last year by the National Research Council, found that immigration provides an overall modest net gain for the United States – roughly \$ 7 billion to \$ 10 billion a year in an \$ 8 trillion economy."); Daniel T. Griswold, *Is Legal Immigration a Good or Bad Thing for America?*, THE BALTIMORE SUN, Apr. 26, 1998, at 1L (stating, "[t]he payroll taxes paid by these young immigrants is postponing the day of financial insolvency for federal programs such as Medicare and Social Security"); Ana Mendieta, *Coalition Touts Immigration as Top Issue for Candidates*, CHI. SUN-TIMES, Aug. 20, 2000, at 22 ("Mexicans don't enjoy benefits even when they don't pose a social burden but pay taxes."); Andres Viglucci, *Small Town Gives Immigrants a Hesitant 'Bienvenido'; Newcomers Fuel Economy, Debate*, THE TIMES-PICAYUNE, Jan. 16, 2000, at A26 (describing the benefit immigrants bring to a town by increasing the labor pool and demand for goods).

¹¹ See *infra* Part III (discussing the equal protection problems raised by the selective enforcement of immigration law).

¹² WOODY GUTHRIE, *DEPORTEE* (Ludlow Music Inc. 1961) (relating the story of migrants who come to the United States, work in the fields, and are deported); see also Eric Schmitt, *Ambivalence Prevails in Immigration Policy*, N.Y. TIMES, May 27, 2001, at 12 ("There's a

depicts the existing conflict that plagues immigration law and fuels its unstable border policies.¹³ The government seeks to satisfy employers who hire immigrants as a source of inexpensive, reliable, and seasonal labor.¹⁴ Conversely, the government also favors a closed border because citizens fear that immigrants will depress the economy by taking jobs and exhausting social security and other benefits.¹⁵ These policies stand in stark contrast to the Statute of Liberty's affectionate greeting and the open door policy spanning most of the nineteenth century.¹⁶

Such immense shifts in ideology have led to inconsistent implementation of immigration law.¹⁷ The disparate laws, in turn, have resulted in ineffective and inhumane enforcement of immigration

fundamental ambivalence in our nation over what to do about illegal immigrants who are living in our communities and who have become contributing members.").

¹³ See GUTHRIE, *supra* note 12.

¹⁴ CALAVITA, *supra* note 7, at 21 (1992) ("Growers want a labor supply which, on one hand, is ready and willing to meet the short-term work requirements and which, on the other hand, will not impose social and economic problems on them or their community when the work is finished."); Elizabeth M. Dunne, Comment, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 640 (2000) ("The evident dependency of particular sectors of the U.S. economy on undocumented workers hints at the gaps and contradictions in U.S. immigration policy . . ."); Monica L. Heppel & Luis R. Torres, *Mexican Immigration to the United States After NAFTA*, 20 FLETCHER FOREIGN WORLD AFF. 51, 53 (1996) ("U.S. agriculture's desire for Mexican workers historically has been a key factor in keeping Mexican labor migration an item on the U.S. policy agenda."); Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 82 (1998) ("Aggregate empirical studies support the conclusion that immigrants are a boon to the economy."); Schmitt, *supra* note 12, at 12 ("Once inside the border, however, illegal immigrants who evade the Border Patrol and survive scorching deserts and treacherous mountains find a nation that is increasingly willing to ignore laws that forbid hiring them and to embrace them in homes and workplaces."); Smith, *Criminal*, *supra* note 2, at 163 ("Immigrants contribute to the stability of American society.").

¹⁵ HARWOOD, *supra* note 2, at 2 (revealing that the American population is not feeling very hospitable toward even legal immigrants); Smith, *Criminal*, *supra* note 2, at 170-71 (referring to the popular view that "ethnic groups . . . merely burden our economic and social structures."); William R. Tamayo, *When the "Coloreds" are Neither Blacks nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 11 (1995) ("[I]mmigrants are still perceived . . . as taking jobs away from American citizens.").

¹⁶ *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 n.15 (1952); 7 BRITANNICA, *supra* note 1, at 332; HARWOOD, *supra* note 2, at 2; VAN VLECK, *supra* note 2, at 3; Chung, *supra* note 2, at 276; Smith, *Criminal*, *supra* note 2, at 165; Ting, *supra* note 2, at 302; Ziskind & Horney, *supra* note 2, at 2; see also Margaret Cerrato-Blue, *Alien Drug Offenders: Where Do They All Belong*, 5 GEO. IMMIGR. L.J. 277, 277 (1991) ("After fighting with the Immigration and Naturalization Service to remain in the United States for four years, former Beatle, John Lennon, stated, 'I can't understand it. I always thought the Statue of Liberty said 'Come' . . . Now I'm going home to . . . start looking at some travel catalogues.'").

¹⁷ See *infra* Part II (discussing immigration law's inconsistent implementation).

186 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

policies.¹⁸ The contradictory policies have created significant equal protection concerns by treating similarly situated groups differently.¹⁹ They have also resulted in loopholes that encourage both employers and immigrants to circumvent the law.²⁰ Immigrants flow to less patrolled areas and either cross the border, contributing to the growing number of undocumented migrants living in the United States, or they lose their lives to treacherous and inadequately patrolled terrain.²¹ Employers, in turn, illegally hire the immigrants because they find violating the law to be more cost effective than upholding it.²² As a result, such ineffective policies waste money and resources by creating more problems than they solve.²³

This Note analyzes the inconsistent application of immigration law on the United States borders by examining the impact that frequent shifts in ideology have had on immigration law. Specifically, this Note addresses the need in the United States for uniform statutory law allowing employers to determine the number of entrants into the country by issuing guest worker visas, and thus balancing the interests of employers and citizens. Part II of this Note briefly discusses the history and development of immigration law in the United States and the origins of inconsistent border policies, as well as a history of immigrant rights and the current conflict of interests between employers and citizens.²⁴ Part III examines the current status of immigration law by addressing the equal protection concerns that selective enforcement of immigration law raises.²⁵ Part IV reviews the public policy concerns of inconsistent laws, explaining why a need exists in the United States for a uniform immigration law.²⁶ Furthermore, Part IV explores the dangers

¹⁸ See *infra* Parts IV and V.B (discussing immigration law's ineffective and inhumane results).

¹⁹ See *infra* Part III (discussing immigration law's equal protection concerns).

²⁰ See *infra* Parts IV and V.A (discussing the ability of immigrants and employers to circumvent the law).

²¹ U.S. Department of Justice, Immigration and Naturalization Service, *Illegal Alien Resident Population*, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm> (last visited Feb. 18, 2001); Kevin Tessier, *Immigration Project: Immigration and the Crisis in Federalism: A Comparison of the United States and Canada*, 3 IND. J. GLOBAL LEGAL STUD. 211, 212 (1995) ("Recent studies indicate that this number is growing by 200,000 to 300,000 people annually.").

²² CALAVITA, *supra* note 7, at 7; Dunne, *supra* note 14, at 639; Heppel & Torres, *supra* note 14, at 53.

²³ See *infra* Parts IV and V.B (discussing the problems and costs of ineffective immigration law).

²⁴ See *infra* Part II (discussing immigration law and its impact on border policies).

²⁵ See *infra* Part III (discussing equal protection problems).

²⁶ See *infra* Part IV (discussing the public policy concerns).

to which an inconsistent immigration policy exposes United States citizens.²⁷ Part V describes the threats the migrant worker faces when immigrating to the United States and the incentives inducing illegal immigration.²⁸ Finally, Part VI proposes a model statute that balances the countervailing interests of employers and citizens, and establishes an effective and consistent immigration policy.²⁹

II. THE HISTORY AND DEVELOPMENT OF IMMIGRATION LAW

This Part reviews and analyzes the foundation and history of immigration law as it has developed in the United States. A review of the evolution of immigration law's inconsistent policies is important in order to provide the necessary framework for understanding current developments in the area. Subpart A begins by discussing the origin of immigration law in the context of a central government and the purposes for placing the law under federal control.³⁰ Subpart B examines the growth of immigration law and its fluctuation due to changing attitudes and economic climates.³¹ Subpart C examines recent developments in the United States' regulation of the Mexican and Canadian borders.³² Subpart D concludes by discussing illegal immigrants' rights under the Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.³³

A. *The Federal Government Claims Control of Immigration*

The federal government first began to regulate entry into the United States in 1875, determining that immigration law should be subject to a "uniform system or plan."³⁴ Recognizing that the Constitution delegates to Congress the broad power to govern foreign commerce, the Supreme Court unanimously determined that state control of immigration infringed on congressional authority and, therefore, was

²⁷ See *infra* Part IV.B (discussing the dangers to United States citizens).

²⁸ See *infra* Part V.B (discussing the effect of current border policies on the migrant worker).

²⁹ See *infra* Part VI (discussing the proposed solution).

³⁰ See *infra* Part II.A (discussing the origin of federal immigration laws).

³¹ See *infra* Part II.B (discussing fluctuating immigration policies).

³² See *infra* Part II.C (discussing the development of land border regulations).

³³ See *infra* Part II.D (discussing the Supreme Court's analysis of the rights of illegal immigrants).

³⁴ *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875). "The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco." *Id.*; see also ROY L. GARIS, *IMMIGRATION RESTRICTION* 80 (1927).

188 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

unconstitutional.³⁵ The Court has since repeatedly affirmed the view that the federal government has plenary and exclusive power to regulate immigration and naturalization, expressing great deference to Congress and reluctance to interfere in controlling immigration.³⁶

Following the Supreme Court's initial ruling, Congress began at once to exercise its plenary powers by enacting several immigration laws.³⁷

³⁵ U.S. CONST. art. § 8, cl. 3 (establishing that Congress shall "regulate Commerce with foreign Nations"); *Henderson*, 92 U.S. at 259 (invalidating a New York statute that imposed a bond or commutation tax upon ships carrying foreign passengers); *see also* U.S. CONST. art. I, § 8, cl. 4 (determining that Congress shall "establish an uniform rule of Naturalization"); GARIS, *supra* note 34, at 80; Grandrath, *supra* note 3, at 756 ("[S]tate regulation of immigration was unconstitutional because it infringed on Congress' power to control foreign commerce."); Jay T. Jorgensen, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 BYU L. REV. 899, 902 (1997) ("[B]ecause U.S. immigration policies have national impact both domestically and in 'our relations with foreign powers,' the federal courts have repeatedly held that the power to regulate immigration is exclusively vested in the political branches of the federal government.").

³⁶ *See, e.g.,* *Reno v. Flores*, 507 U.S. 292, 305 (1993); *Plyler v. Doe*, 457 U.S. 202, 224-25 (1982) ("Drawing upon this power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders."); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("Over no conceivable subject is the legislative power of Congress more complete . . ."); *Matthews v. Diaz*, 426 U.S. 67, 81 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors have been committed to the political branches of the Federal Government."); *De Canas v. Bica*, 424 U.S. 351, 354 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972); *Boutilier v. INS*, 387 U.S. 118, 123 (1967) ("It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (asserting that immigration powers "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889); *Chiles v. United States*, 874 F. Supp. 1334, 1339 (D. Fla. 1994), *aff'd*, 69 F.3d 1094 (11th Cir. 1995) (noting that the Federal government's plenary control over immigration is not disputed); HARWOOD, *supra* note 2, at 2; Grandrath, *supra* note 3, at 756-57; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992).

³⁷ GARIS, *supra* note 34, at 81 ("[T]he Federal Government soon embarked upon a national policy of regulating immigration, which has resulted in restriction after restriction, until at the present time we have what may be called 'a drastic immigration law.'"); MILTON D. MORRIS, *IMMIGRATION - THE BELEAGUERED BUREAUCRACY* 90 (1985) (referring to the enactment of several immigration laws shortly after the judicial action of the Court); VAN VLECK, *supra* note 2, at 6 ("The policy once established, other legislation by Congress soon followed.").

Congress first passed the Act of 1875,³⁸ in response to growing anti-immigrant sentiment, which was fueled by an economic depression.³⁹ The Act barred foreign convicts, prostitutes, diseased persons, paupers, polygamists, the insane, and anarchists from entering the United States.⁴⁰

Congress next passed the Act of 1882,⁴¹ a general immigration law, which assessed a fifty-cent head tax on each alien brought into the country and barred the entry of any alien likely to become a public charge.⁴² However, because Canadians and Mexicans were often used to

³⁸ The Act of March 3, 1875, ch. 141, 18 Stat. 477 (repealed in 1974 by Pub. L. No. 93-461, 88 Stat. 1387).

³⁹ *Id.*; see also GARIS, *supra* note 34, at 86; VAN VLECK, *supra* note 2, at 5 (maintaining that the states burdened with "taxing their own citizens to pay the expense of caring for arriving aliens who became ill and destitute" was a decisive factor of the Act's passage); Grandrath, *supra* note 3, at 758; Ting, *supra* note 2, at 302-03 ("The popular view of Chinese as criminals and prostitutes led to the enactment of the first federal statute restricting immigration in 1875, an act which excluded criminals and prostitutes from immigrating to the United States.").

⁴⁰ The Act of March 3, 1875, ch. 141. The Act provided:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 5. That it shall be unlawful for aliens of the following classes to immigrate into the United States, namely, persons who are undergoing a sentence for conviction in their own country of felonious crimes other than political or growing out of or the result of such political offenses, or whose sentence has been remitted on condition of their emigration, and women "imported for the purposes of prostitution." Every vessel arriving in the United States may be inspected under the direction of the collector of the port at which it arrives, if he shall have reasons to believe that such obnoxious persons are on board; and the officer making such inspection shall certify the result thereof to the master or other person in charge of such vessel, designating in such certificate the person or persons, if any there be, ascertained by him to be of either of the classes whose importation is hereby forbidden.

Id.; see also Grandrath, *supra* note 3, at 758 ("In 1875, through its plenary power, Congress began to prohibit certain "undesirables" from immigrating to the United States, including convicts, prostitutes, diseased persons, paupers, polygamists, the insane, and anarchists.").

⁴¹ Act of Aug. 3, 1882, ch. 376, 22 Stat. 214.

⁴² *Id.* The Act states:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be levied, collected and paid a duty of fifty cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States.

SEC. 2. - [I]t shall be the duty of such State commission, board, or officers so designated to examine into the condition of passengers arriving at the ports within such State in any ship or vessel, and for that purpose all or any of such commissioners or officers or such other person or persons as they shall appoint, shall be authorized to go on

190 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

alleviate wartime labor shortage, they were able to escape the restrictions imposed upon Europeans and Asians until the 1920s.⁴³

B. Change in Perspective Prompts Congress to Implement Land Border Restrictions

Following World War I, the United States further restricted immigration.⁴⁴ Due to its fear of an immediate rush of immigrants from European countries, it favored an isolationist policy and began to exclude all immigrants, including Canadians and Mexicans.⁴⁵ Consequently, Congress enacted the 1921 Quota Law,⁴⁶ a numerical limitation dictating the number of immigrants allowed to enter the

board of and through any such ship or vessel; and if on such examination there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge, they shall report the same in writing to the collector of such port, and such persons shall not be permitted to land.

Id.; see also GARIS, *supra* note 34, at 87-88; VAN VLECK, *supra* note 2, at 6 (providing that the Act also added to the excludable classes lunatics, idiots, and persons likely to become a public charge); Grandrath, *supra* note 3, at 758-59 ("Congress also did not want poor immigrants on the government relief rolls; therefore, the head tax had the effect of deterring the poor from immigrating.").

⁴³ HARWOOD, *supra* note 2, at 2-3. Canadians and Mexicans did not have to pay the eight-dollar head tax or meet the literacy requirement imposed upon aliens from overseas to gain admittance to the United States, therefore they had little reason to enter illegally. *Id.* To help alleviate wartime labor shortage, the United States invited the Mexicans into the country during World War I. *Id.* Nearly 75,000 Mexicans entered legally between 1917 and 1921. *Id.* Many continued to live in the country until the Great Depression created pressure for mass deportations back to Mexico. *Id.*; see also Act of Feb. 5, 1917, ch. 29. The Act stated in part:

That there shall be levied, collected, and paid a tax of \$8 for every alien, including alien seamen regularly admitted as provided in this Act, entering the United States That said tax shall not be levied on account of aliens who enter the United States after an uninterrupted residence of at least one year immediately preceding such entrance in the Dominion of Canada, Newfoundland, the Republic of Cuba, or the Republic of Mexico

Act of Feb. 5, 1917, ch. 29.

⁴⁴ HARWOOD, *supra* note 2, at 2 (referring to the "restrictive nationalism" of the United States); VAN VLECK, *supra* note 2, at 16 (describing the "prospect of an immediate rush of immigrants from European countries" at the close of war, prompting the United States to increase immigration restrictions); Grandrath, *supra* note 3, at 759 (explaining the United States' favoritism of an isolationist policy and its dissatisfaction with the current exclusions).

⁴⁵ HARWOOD, *supra* note 2, at 2 ("[T]he passage of Mexican and Canadian nationals back and forth across our land borders remained relatively unhindered until 1917."); VAN VLECK, *supra* note 2, at 16; see also Grandrath, *supra* note 3, at 759.

⁴⁶ Act of May 19, 1921, ch. 8, 42 Stat. 5 (repealed 1952).

United States annually based on national origin.⁴⁷ Unfortunately, the new quota system admitted only a limited number of immigrants each year and thus provoked many to circumvent the government's approval and cross the border illegally.⁴⁸

The Quota Act was due to expire in 1924, but Congress extended it with the National Origins Act.⁴⁹ In the same year, Congress also created the Border Patrol to prevent unlawful entries from Canada and Mexico.⁵⁰ High unemployment rates during the Great Depression further amplified anti-foreigner sentiment, and the 1930s provided little relief for immigrants.⁵¹ Pressure then mounted for mass deportations of

⁴⁷ *Id.* The Act stated:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, . . . [t]hat the number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910.

Id.; see also GARIS, *supra* note 34, at 142; MORRIS, *supra* note 37, at 95 (describing "the imposition of annual ceilings on total immigration and quotas for each country in 1921"); VAN VLECK, *supra* note 2, at 17 ("This legislation marked a complete departure in immigration legislation because it introduced the policy of numerical restriction."); Grandrath, *supra* note 3, at 759.

⁴⁸ HARWOOD, *supra* note 2, at 7 ("Because demand for entry into the United States far exceeds the supply of visa slots, it is hardly surprising that aliens should seek to circumvent the law."); Grandrath, *supra* note 3, at 759 ("Because the United States only admitted a limited number of immigrants each year, many aliens eager to enter the country chose to circumvent the government's approval and crossed the border illegally.").

⁴⁹ National Origins Act of 1924, ch. 190, § 11(b), 43 Stat. 153, 159 (1924). The Act required that:

The annual quota of any nationality for the fiscal year beginning July 1, 1927, and for each fiscal year thereafter, shall be a number which bears the same ratio to 150,000 as the number of inhabitants in continental United States in 1920 having that national origin (ascertained as hereinafter provided in this section) bears to the number of inhabitants in continental United States in 1920, but the minimum quota of any nationality shall be 100.

Id.; see also VAN VLECK, *supra* note 2, at 17; Lawrence H. Fuchs, *Directions for U.S. Immigration Policy: Immigration Policy and the Rule of Law*, 44 U. PITT. L. REV. 433, 433 (1983) (determining that the Act reduced the world quota to 150,000, plus unlimited entry by Canadians and Latin Americans, down from over one million annually).

⁵⁰ Trevino, *supra* note 7, at 88-89 (referring to Congress' creation of the Border Patrol in 1924 as part of the Immigration Bureau, predecessor to the INS; see also Elvia R. Arriola, *Voices from the Barbed Wire of Despair: Women in the Maquiladoras*, *Latina Critical Legal Theory, and Gender at the U.S.-Mexico Border*, 49 DEPAUL L. REV. 729, 800 (2000) ("The Border Patrol came to the Southwest in 1924.")).

⁵¹ HARWOOD, *supra* note 2, at 3; Fuchs, *supra* note 49, at 434 (revealing that unemployment was the highest in the nation's history).

192 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

Mexicans, many of whom the United States had invited to help meet wartime labor shortage less than two decades earlier.⁵²

During World War II, however, an ambivalent United States once again opened its doors to immigration.⁵³ The Border Patrol paid little attention to the illegal immigrants who came to the United States to help counter labor shortages.⁵⁴ The wartime demand for workers gave birth to the *Bracero* Program, an official agenda that allowed Mexican guest workers to enter the country as temporary laborers.⁵⁵ During the

⁵² HARWOOD, *supra* note 2, at 3 ("When Operation Deportation was initiated, tens of thousands of Mexicans voluntarily decided to leave the United States, partly because jobs were drying up and partly because of pressures exerted by local officials and citizens."); Fuchs, *supra* note 49, at 434 (explaining that anti-immigrant fervor was so high that "Congress actually defeated a special refugee bill that was intended to rescue 20,000 children from Nazi Germany because the German quota had been filled, despite the availability of sponsors").

⁵³ CALAVITA, *supra* note 7, at 19 ("The following year, with the attack on Pearl Harbor and the entry of the United States into World War II, the [hostile] official attitude towards Mexican contract labor changed abruptly."); HARWOOD, *supra* note 2, at 4 ("This cycle of first an open and then a closed door at the southern border repeated itself again during World War II, when the wartime demand for workers led to an official guest worker program that allowed Mexican *braceros* to enter as temporary workers . . .").

⁵⁴ HARWOOD, *supra* note 2, at 4 (describing "a more relaxed attitude toward enforcing the law against illegal entrants"); Katherine L. O'Connor, *An Overview of Illegal Immigration Along the United States-Mexican Border*, 4 D.C. L. J. INT'L L. & PRAC. 585, 594 (1995) ("During World War II, the U.S. federal government imported large numbers of Mexican laborers to fill the labor shortage."); Victor C. Romero, Note, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants' Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. CAL. L. REV. 999, 1000 n.5 (1992) ("Ironically, despite this hatred and fear of undocumented immigrants, America actually encouraged undocumented immigration to offset the labor shortage created by World War II."); Trevino, *supra* note 7, at 89 ("Little attention was given during this time to the flow of illegal immigrants who came to America and helped offset the labor shortage due to the war.").

⁵⁵ CALAVITA, *supra* note 7, at 1. *Bracero* comes from *brazo*, the Spanish word for arm, and is loosely translated as "farmhand." *Id.* "Arm-man," its literal meaning, describes the role that *braceros* played in the agricultural economy: they supplied farmers with an extra pair of arms, but imposed little obligation on the host society. *Id.*; see also Act of April 29, 1943, ch. 82, 57 Stat. 70, 71. The Act established:

That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$26,100,000 . . . for assisting in providing an adequate supply of workers for the production and harvesting of agricultural commodities essential to the prosecution of war, as follows.

SEC. 5. (g) In order to facilitate the employment by agricultural employers in the United States of native-born residents of North America, South America, and Central America, and the islands adjacent thereto, desiring to perform agricultural labor in the United States, during continuation of hostilities in the present war, any such

program's twenty-two year existence, growers and ranchers in twenty-four states hired five million *braceros*.⁵⁶ Nonetheless, the program was

resident desiring to enter the United States for that purpose shall be exempt from the payment of head tax required by Section 2 of the Immigration Act of February 5, 1917, and from other admission charges, and shall be exempt from those excluding provisions of Section 3 of such Act which relate to contract laborers, the requirements of literacy, and the payment of passage by corporations, foreign government, or others

Act of April 29, 1943, ch. 82. For more information on the *Bracero* Program, see HARWOOD, *supra* note 2, at 4; Linda J. Wong, *The Role of Immigrant Entrepreneurs in Urban Economic Development*, 7 STAN. L. & POL'Y REV. 75, 76 n.18 (1996) (explaining that the *Bracero* Program was a temporary program established as the result of war-induced labor shortages); Ziskind and Horney, *supra* note 2, at 3-4.

⁵⁶ CALAVITA, *supra* note 7, at 1. Farmers in a number of southwestern states formally requested permission from the INS to import Mexicans who would grow and harvest crops, but their requests were denied. *Id.* at 19. The INS did not consider the program until the attack on Pearl Harbor and the United States' entry into World War II prompted an abrupt change in the official attitude toward Mexican contract work. *Id.* Then, in April of 1942, the INS formed a committee composed of the top officials from the Departments of Justice, Labor, State, and Agriculture and the War Manpower Commission, to consider the possibility of creating a temporary worker program. *Id.* By May, the Special Committee on Importation of Mexican Labor had created a labor importation program designed to offset World War II labor shortages. *Id.* Mexico and the United States signed a bilateral agreement on April 4, 1942, implementing the *Bracero* Program. *Id.* The compromise established that the *braceros* were "not to be paid less than domestic workers doing similar work - and in no case were to be paid less than 30 cents an hour - and specified that piece rates be calculated to allow the average *bracero* to earn at least the minimum hourly wage." *Id.* *Braceros* were even allowed to discuss complaints with their employers through elected representatives, if the discussions did not entail upgrading the terms of the contracts. *Id.* Congress enacted the public law officially sanctioning the program on April 29, 1943. *Id.* at 22. The State Department, the Department of Labor, and the INS in the Department of Justice jointly operated the *Bracero* Program. *Id.* at 1. The INS served the critical role of official gatekeeper, controlling entries, departures, and *bracero* desertions, which gave the agency tremendous authority over the entire program. *Id.* The Program included an internal check on illegal immigration by providing incentive for ranchers themselves to screen for illegal entrants because, if caught employing them, they would forfeit their right to hire legal *braceros* for a season or two. *Id.* at 44. Texas employers were even excluded from the program at the outset because Mexican negotiators "cited a history of discrimination and abuse of Mexican workers in that state." *Id.* at 20; see also Richard E. Blum, Note, *Labor Standards Enforcement and the Results of Labor Migration: Protecting Undocumented Workers After Sure-lan, the IRCA, and Patel*, 63 N.Y.U. L. REV. 1342, 1373 n.222 (1988) ("Under this program, known as the *Bracero* Program, between four and five million temporary workers were admitted between 1942 and 1964, when the United States ended the program."); Gregory J. Ehardt, Comment, *Why California's Proposition 187 is a Decision for the U.S. Supreme Court*, 3 TULSA J. COMP. & INT'L L. 293, 295 (1996) (pointing out that the *Bracero* Program was "designed to recruit five million Mexican farm workers to aid farmers in the states along the Mexican border").

194 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

terminated in 1964, when labor unions pressed for its cancellation, fearing it was taking jobs from United States' workers.⁵⁷

The United States dramatically changed its policy toward Mexican immigrants by terminating the *Bracero* Program in the 1960s.⁵⁸ The Border Patrol refocused on preventing immigrants from illegally entering the United States through the Mexican Border, and it implemented Operation Wetback, a special task force that deported over one million Mexicans during its lifetime.⁵⁹ Despite this shift in policy, documented illegal crossings accelerated.⁶⁰

During that same time period, in 1952, Congress passed the Immigration and Nationality Act ("INA"),⁶¹ the cornerstone of modern

⁵⁷ HARWOOD, *supra* note 2, at 5 (stating that "localized economic grievances played a role" in the *Bracero* Program's termination); see also A. Maria Plumtree, *Maquiladoras and Women Workers: The Marginalization of Women in Mexico as a Means to Economic Development*, 6 SW. J. L. & TRADE AM. 177, 181 (1999) ("The termination of the *Bracero* Program in 1964 left Mexico with approximately 185,000 unemployed workers in its northern border region.").

⁵⁸ HARWOOD, *supra* note 2, at 5; see also Plumtree, *supra* note 57, at 181.

⁵⁹ Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503, 520-21 (1998). In 1954, United States citizens started to blame Mexicans, many of which arrived during the *Bracero* Program, for depressed wages and displacement of potential native laborers. *Id.* In response, the Federal Government initiated Operation Wetback. *Id.* The operation was a special task force that relied on the help of employers, small planes and jeeps to combat the "wetback problem" by capturing over one million undocumented Mexicans and deporting them to Mexico. *Id.*; see also A DICTIONARY OF AMERICANISMS 1853 (Mitford M. Mathews ed. 1951) (revealing that the derogatory term "wetback" originally referred to ponies that were stolen from Mexico and got their backs wet crossing the Rio Grande, but it was cruelly adapted in the 1940s to refer to a "Mexican who gains entrance into the U.S. by swimming the Rio Grande River"); HARWOOD, *supra* note 2, at 5; NEW DICTIONARY OF AMERICAN SLANG 462 (Robert L. Chapman ed. 1986) (defining a "wetback" as a "Mexican who enters the U.S. illegally, especially as a migratory worker"); Alan K. Simpson, *The Immigration Reform and Control Act: Immigration Policy and the National Interest*, 17 U. MICH. J.L. REFORM 147, 161 n.76 (1984) ("While deporting over 100,000 illegal aliens--most of them from Mexico--many of the INS's tactics were criticized and some Mexican-Americans were removed by mistake."); Trevino, *supra* note 7, at 89.

⁶⁰ HARWOOD, *supra* note 2, at 5-6. The author supplies:

Whatever the motivations behind this dramatic change in policy, the termination of the *bracero* program did not mean that their labor was no longer desired on the U.S. side. As INS statistics clearly show, illegal crossings over the southern border began to accelerate in the late 1960s. Although border patrol apprehensions in the early 1960s were a modest 30,000 to 40,000 a year (and accounted for only about 50 percent of nationwide INS apprehensions), by 1966, the patrol was apprehending 80,000 aliens, of whom 90 percent were Mexican nationals.

Id.

⁶¹ Act of June 27, 1952, ch. 477, 66 Stat. 163.

immigration law.⁶² The INA retained natural origin quotas, strengthened exclusions, and made naturalization more rigorous.⁶³ It

⁶² Grandrath, *supra* note 3, at 759 ("In 1952, Congress passed the Immigration and Nationality Act (INA), the cornerstone of current immigration law."); see also Fuchs, *supra* note 49, at 434, ("The next major overhaul of United States immigration law – not policy – took place in 1952 through the McCarran-Walter Act, which codified and revised the Immigration and Nationality Act.")

⁶³ Act of June 27, 1952, ch. 477. The Act provided:

SEC. 201. (a) The annual quota of any quota area shall be one-sixth of 1 per centum of the number of inhabitants in the continental United States in 1920, which number, except for the purpose of computing quotas for quota areas within the Asia-Pacific triangle, shall be the same number heretofore determined under the provisions of section 11 of the Immigration Act of 1924, attributable by national origin to such quota area

SEC. 312. No person except as otherwise provided in this title shall hereafter be naturalized as a citizen of the United States upon his own petition who cannot demonstrate-

an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language

a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States.

SEC. 313. (a) [N]o person shall hereinafter be naturalized as a citizen of the United States-

who advocates or teaches, or who is a member of or affiliated with any organization that advocates or teaches, opposition to all organized government; or

who is a member of or affiliated with (A) the Communist Party of the United States; (B) any other totalitarian party of the United States

Id.; see also MORRIS, *supra* note 37, at 21; Fuchs, *supra* note 49, at 434 ("The emphasis was still on restriction with somewhat greater attention paid to qualitative exclusions than to the numerical limits, which seemed permanently entrenched."); Grandrath, *supra* note 3, at 759-60. But see Matias F. Travieso-Diaz, *Immigration Challenges and Opportunities in a Post-Transition Cuba*, 16 BERKELEY J. INT'L L. 234, 237 (1998). Although the United States' immigration policy was becoming stricter overall, it became more lenient with respect to Cubans. *Id.* Throughout the first half of the century, the United States did not have a separate immigration policy toward Cuba. *Id.* Not until after the Cuban Revolution, in 1959, did the communist threat motivate the United States to establish a distinct policy. *Id.* Cubans were allowed to come to the United States on a parole basis and, unlike other immigrants, did not need to obtain visas. *Id.* at 239. They were deemed refugees even if they entered the country illegally. *Id.* They were also given preferential treatment in achieving legal immigrant status. *Id.* Congress passed the Cuban Adjustment Act in 1966, enabling Cubans to adjust their status to become permanent United States residents two years after arriving, without leaving the country. *Id.* Cubans could change their status to legal resident without having to show a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political belief, unlike other refugees who were required to establish a well-founded fear. *Id.* The current immigration policy with respect to Cubans involves a land-sea distinction. *Id.* at 247. Cubans intercepted at sea are almost always returned to Cuba, while those who manage to reach American soil are given asylum, in sharp contrast to Mexicans who reach American soil. *Id.*; see generally INA, *supra* note 61, at § 201. The United States still has broadened

196 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

also modified the worldwide quota by establishing a preference for skilled aliens whose services the United States urgently needed.⁶⁴ Finally, it transferred the INS, the agency implementing and enforcing immigration law, from the Department of Labor to the Department of Justice.⁶⁵ In 1965, Congress further added to the INA by abandoning the national origins system and imposing a ceiling on immigrants from the Western Hemisphere.⁶⁶

C. Congress Continues to Regulate Immigration By Fortifying the Southern Border

In the mid-1980s, attention again focused on the border, and Congress passed the Immigration Reform and Control Act of 1986 ("IRCA"),⁶⁷ authorizing a fifty-percent increase to the Border Patrol

asylum guidelines for Cubans to include certain people who do not have to meet the well-founded fear standard. Travieso-Diza, *supra* at 248. Additionally, Cubans have been granted an increased number of lottery visas. *Id.* In 1996, the Senate voted 62-37 to keep the Cuban Refugee Adjustment Act in place until a democratic government is in place in Havana. *Id.* at 250.

⁶⁴ Fuchs, *supra* note 49, at 434 ("The system of selective immigration within the worldwide quota was refined by establishing a preference for skilled aliens whose services were urgently needed in this country.") *Id.*; see generally John A. Glenn, Annotation, *Construction and Application of § 203(a)(3) of Immigration and Nationality Act of 1952* (8 U.S.C.A. § 1153(a)(3)) as Amended Giving Preference Visas to Professionals or Persons Having Ability in Arts and Sciences, 18 A.L.R. FED. 287 (1999).

⁶⁵ Ziskind & Horney, *supra* note 2, at 4; see also Grandrath, *supra* note 3, at 760 ("As a bureau of the Department of Justice, the INS has two objectives: (1) to provide statutorily eligible aliens with benefits and relief under the INA; and (2) to enforce the civil and criminal provisions of the Act against alien and citizen violators.").

⁶⁶ Pub. L. No. 89-236 § 2(a), 79 Stat. 911 (1965) (amending the INA). The Act eliminates the preference for immigrants from the Western Hemisphere by asserting:

No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence *Provided*, That the total number of immigrant visas and the number of conditional entries made available to natives of any single foreign state . . . shall not exceed 20,000 in any fiscal year

Id.; see also MORRIS, *supra* note 37, at 21; Fuchs, *supra* note 49, at 435 ("In order to break the now-acknowledged racist national origins quota system and to expand legal immigration from the Eastern Hemisphere, Congress also agreed to a Western Hemisphere ceiling of 120,000 with no country limitation or preference system at that time"); Manfred Zuleeg, *What Holds a Nation Together? Cohension and Democracy in the United States of America and the European Union*, 45 AM. J. COMP. L. 505, 515 (1997) (pointing out that no nationality was to receive a preference for visas, thus imposing a ceiling on immigrants from the Western Hemisphere).

⁶⁷ Pub. L. No. 99-603 § 111(a), 100 Stat. 3359 (1986) (codified in scattered Sections of 5, 8, & 29 U.S.C.); see also Trevino, *supra* note 7, at 89.

staff.⁶⁸ IRCA also attempted to reduce employer demand for illegal immigrants by including an employer sanctions provision; the provision made knowing employment of unauthorized workers illegal.⁶⁹ In 1996,

⁶⁸ Pub. L. No. 99-603 § 111(a), 100 Stat. 3359 (1986). The Act states:

TWO ESSENTIAL ELEMENTS. - It is the sense of Congress that two essential elements of the program of immigration control established by this Act are-

(1) an increase in the border patrol and other inspection and enforcement activities of the Immigration and Naturalization Service and of other appropriate Federal agencies in order to prevent and deter the illegal entry of aliens into the United States and the violation of the terms of their entry, and

(2) an increase in examinations and other service activities of the Immigration and Naturalization Service and other appropriate federal agencies in order to ensure prompt and efficient adjudication of petitions and applications provided for under the Immigration and Nationality Act.

Id.; see also Smith, *Criminal*, *supra* note 2, at 182 ("In 1986, the Immigration Reform and Control Act (IRCA) was instituted to bolster enforcement of immigration laws and provide amnesty programs for illegal aliens in the United States since the beginning of 1982."); Trevino, *supra* note 7, at 89 ("IRCA authorized an increase in the Border Patrol staff by fifty percent.").

⁶⁹ Pub. L. No. 99-603 § 274A, 100 Stat. 3359 (1986). The Act states:

MAKING EMPLOYMENT OF UNAUTHORIZED ALIENS UNLAWFUL.-

IN GENERAL.- It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States-an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment, or an individual without complying with the requirements of subsection (b).

CONTINUING EMPLOYMENT.- It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

DEFENSE.- A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

Id.; see also CALAVITA, *supra* note 7, at 168. The program was "hailed by its restrictionist advocates" as means of gaining control over the border by eliminating job opportunities for undocumented workers. CALAVITA, *supra* note 7, at 168. Nonetheless, the provision was ineffective due to its "affirmative defense" clause that protected employers from liability if they requested documentation from workers, regardless of the validity of the papers that the workers presented. *Id.* at 169. Employer sanctions were also doomed by the strength of the "push-pull economic forces that trigger immigration in the first place - forces that are far too compelling to be repressed by legislative fiat." *Id.* Employers use many strategies to avoid the law because they are attracted by the substantial economic benefits of an illegal workforce. *Id.* One California employer that depends on immigrants stated,

198 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

Congress further strengthened the Border Patrol with the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), another amendment to the INA.⁷⁰ Congress enacted the IIRIRA after the Immigration and Naturalization Service ("INS") estimated an increase of 300,000 undocumented immigrants per year, with Mexican migrants accounting for 154,000 of those immigrants.⁷¹ The IIRIRA sought to deter illegal immigration by increasing border patrol and investigative personnel, and reforming exclusion and deportation law procedures.⁷² The new law required the additional border patrol agents to be stationed on the border in proportion to the number of illegal crossings at each sector for the purpose of providing "a uniform and visible deterrent to illegal entry on a continuing basis."⁷³

The IIRIRA also increased the number of border patrol agents by one thousand per year for five years, which doubled the amount of agents on the southern border.⁷⁴ The INS used the additional agents to fortify

"Employers will find some way of finding cheap labor, that's what capitalism is all about." *Id.* at 169-70.

⁷⁰ Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered Sections of 8 & 18 U.S.C.).

⁷¹ U.S. Department of Justice, Immigration and Naturalization Service, *Illegal Alien Resident Population*, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm> (last visited Feb. 19, 2001) (referring to the 1994 estimates); U.S. Department of Justice, Immigration and Naturalization Service, *Immigration Fact Sheet: Country of Origin*, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/299.htm> (last visited Feb. 19, 2001).

⁷² H.R. REP. NO. 104-469[II] (1996). The report states that the purpose of the IIRIRA is to: improve deterrence of illegal immigration to the United States by increasing border patrol and investigative personnel, by increasing penalties for alien smuggling and for document fraud, by reforming exclusion and deportation law and procedures, by improving the verification system for eligibility for employment, and through other measures, to reform the legal immigration system and facilitate legal entries into the United States.

Id.; see also Harry Valetk, Note, "I Cannot Eat Air!": An Economic Analysis of International Immigration Law for the 21st Century, 7 CARDOZO J. INT'L & COMP. L. 141, 151 (1999) ("Not surprisingly, the overwhelming congressional effort to deter illegal crossings is manifest in section 101 of the IIRIRA, which confers startling reinforcement to border control agencies and increases the number of border patrol agents by 1,000 in each of the next five years.").

⁷³ IIRIRA, Pub. L. No. 104-208 § 101(d)(1), 110 Stat. 3009-546 (1996). "The Attorney General shall forward deploy existing border patrol agents in those areas of the border identified as areas of high illegal entry into the United States in order to provide a uniform and visible deterrent to illegal entry on a continuing basis." *Id.*; see also Valetk, *supra* note 72, at 151.

⁷⁴ See IIRIRA, Pub. L. No. 104-208, § 101(a), 110 Stat. 3009-546 (1996). The IIRIRA requires: INCREASED NUMBER OF BORDER PATROL AGENTS. - The Attorney General in each of fiscal years 1997, 1998, 1999, 2000, and 2001 shall increase by not less than 1,000 the number of positions for full-time,

areas on the Mexican border known for high traffic.⁷⁵ Operations 'Gatekeeper,'⁷⁶ 'Hold the Line,'⁷⁷ and 'Rio Grande'⁷⁸ focused forces in Imperial Valley, California; El Paso, Texas; and New Mexico.⁷⁹ The IIRIRA also called for improved fencing along the California-Mexico Border.⁸⁰ Section 102 mandated additional physical barriers to be installed in areas of high traffic, specifically singling out San Diego,

active-duty border patrol agents within the Immigration and Naturalization Service above the number of such positions for which funds were allotted for the preceding fiscal year.

Id.; see also Jorge A. Vargas, *Consular Protection to Illegal Migratory Workers and Mexican Undocumented Minors: Two Sensitive Issues Addressed by the Thirteenth Annual Meeting of the United States-Mexico Binational Commission*, 6 J. TRANSNAT'L L. & POL'Y 143, 152 (1996) ("The new law provided, inter alia, for doubling the number of border patrol agents, increasing INS detention space, and building of a fourteen-mile, three-tier fence along the Mexican border near San Diego.").

⁷⁵ IIRIRA, Pub. L. No. 104-208, § 101(d)(1), 110 Stat. 3009-546 (1996). "The Attorney General shall forward deploy existing border patrol agents in those areas of the border identified as areas of high illegal entry into the United States" *Id.*; see also William Booth, *Emotions on the Edge; Arizona Ranchers Face Tide of Mexicans Along Border*, WASH. POST, June 21, 2000, at A1; Jack McGarvey, *Border Vigilantes Attract the Wrong Crowd*, DENVER POST, June 18, 2000, at G1; Ed Mendel, *Spotlight on the Border; Governors Discuss Detention of Migrants by Arizona Ranchers, Then Round off Their Differences with a Written Declaration*, SAN DIEGO UNION-TRIB., June 3, 2000, at A3; Sergio Munoz, *Border War Must Be Halted Before People Start Dying*, ARIZ. REPUBLIC, May 10, 2000, at B9; Elliot Blair Smith, *Armed Rancher Acts as One-Man Border Patrol*, USA TODAY, Apr. 28, 2000, at 4A [hereinafter Smith, *Patrol*].

⁷⁶ U.S. Department of Justice, Immigration and Naturalization Service, *The National Border Patrol Strategy*, available at <http://www.ins.usdoj.gov/graphics/lawenfor/bpatrol/strategy.htm#California> (last visited Feb. 19, 2001). Although originally intended to patrol only five miles of Imperial Beach that accounted for 25 percent of all illegal border crossings across the nation, Operation Gatekeeper expanded to include the entire border under the San Diego Sector's jurisdiction and spanned 66 miles. *Id.*

⁷⁷ U.S. Department of Justice, Immigration and Naturalization Service, *The National Border Patrol Strategy*, available at <http://www.ins.usdoj.gov/graphics/lawenfor/bpatrol/strategy.htm#Texas> (last visited Feb. 19, 2001). The INS initiated Operation Hold the Line in the El Paso Sector in 1993. *Id.* The sector has since seen a 50 percent decline in apprehensions. *Id.*

⁷⁸ *Id.* The INS launched Operation Rio Grande in 1997, and it is firmly established in McAllen, Brownsville and Laredo. *Id.* In 1998, apprehensions decreased by 35 percent in Brownsville and 27 percent in Laredo. *Id.* Nonetheless, the success is due to the shift in the flow of illegal traffic to other areas. *Id.*

⁷⁹ U.S. Department of Justice, Immigration and Naturalization Service, *The National Border Patrol Strategy*, available at <http://www.ins.usdoj.gov/graphics/lawenfor/bpatrol/strategy.htm> (last visited Feb. 19, 2001); see also Scott Baldauf, *Trapping Coyotes*, THE CHRISTIAN SCI. MONITOR, Aug. 30, 2000, at 1; William Branigin, *Border Patrol Reinforcements to be Sent to Porous Sectors: Rural Southwest Reports Sharp Rise in Immigrant Traffic*, THE WASH. POST, Oct. 8, 1997, at A2; Gregory Alan Gross, *5-Year-Old Gatekeeper is Praised, Denounced: Critics Say it Makes Border More Dangerous*, THE SAN DIEGO UNION-TRIB., at B1.

⁸⁰ IIRIRA, Pub. L. No. 104-208, § 102(b)(1), 110 Stat. 3009-546 (1996); see also Smith, *Criminal*, *supra* note 2, at 182 n.113.

200 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

California for construction of fencing and road improvements.⁸¹ Although the additional staff and enforcement measures were originally designed to be implemented with equal force on both borders, Congress repealed Section 110, which called for stricter monitoring of visitors to and from the United States via Canada; this change actually eased passage on the northern border.⁸²

Finally, the United States executed the North American Free Trade Agreement ("NAFTA")⁸³ with Mexico and Canada, and although illegal immigration was not the motivating factor behind the agreement, it was an influential component.⁸⁴ NAFTA sought to create the world's largest free trade zone by liberalizing economic trade, forcing the United States to address free movement across the borders.⁸⁵ However, NAFTA established different policies for Canadian and Mexican immigrants to compensate for congressional fears.⁸⁶ Congress limited the number of

⁸¹ Pub. L. No. 104-208, § 102(b)(1). The IIRIRA provides:

CONSTRUCTION OF FENCING AND ROAD IMPROVEMENTS IN THE BORDER AREA NEAR SAN DIEGO, CALIFORNIA.—
IN GENERAL.—In carrying out subsection (a), the Attorney General shall provide for the construction along the 14 miles of the international land border of the United States, starting at the Pacific Ocean and extending eastward, of second and third fences, in addition to the existing reinforced fence, and for roads between the fences.

Id.

⁸² Pub. L. No. 104-208, § 110 (repealed 2001). The Section read:

No later than 2 years after the date of the enactment of this Act, the Attorney General shall develop an automated entry and exit control system that will -
collect a record of departure for every alien departing the United States and match the records of departure with the record of the alien's arrival in the United States. . . .

Id. (emphasis added); see also John Nicol, *Hands Across the Border*, MACLEAN'S, July 31, 2000, at 16 ("One result was amendments to the bill to ease passage between the United States and Canada.").

⁸³ North American Free Trade Agreement: Canada-Mexico-United States, Dec. 8, 11, 14, 17, 1992, reprinted in 32 I.L.M. 289 (part 1), 605 (part 2) [hereinafter NAFTA].

⁸⁴ Grandrath, *supra* note 3, at 770 ("Although illegal immigration was not the principal reason Congress passed the North American Free Trade Agreement, it was a factor nonetheless.").

⁸⁵ Valetk, *supra* note 72, at 157 (pointing out the contradictions inherent in liberalizing trade but maintaining closed borders); Gerald A. Wunsch, *Why NAFTA's Immigration Provisions Discriminate Against Mexican Nationals*, 5 IND. INT'L & COMP. L. REV. 127, 127 (1994) ("Although the oft-stated goal of the North American Free Trade Agreement (NAFTA) is to create the world's largest free trade zone, stretching from the Yukon to the Yucatan, U.S. policymakers have seen to it that NAFTA's immigration provisions allow for discriminatory treatment of Mexican nationals as compared to Canadian nationals.").

⁸⁶ NAFTA, *supra* note 83; Wunsch, *supra* note 85, at 130. NAFTA maintained the immigration regulations as they had existed prior to its enactment. Wunsch, *supra* note 85,

Mexican visas each year to 5500, worrying that Mexican nationals would flood the United States labor market under a liberalized labor movement.⁸⁷ Nevertheless, the legislature did not limit the number of Canadian visas, determining that, because Canadian laborers came from a favorable labor market, they, unlike Mexican workers, posed no threat.⁸⁸ Thus, NAFTA also contributed to the inconsistent immigration policies.⁸⁹

at 130. Thus, because Canadians entered the United States with little restriction before 1993, they continued to do so after NAFTA. *Id.* Mexicans, on the other hand, continued to face severe restrictions on their entry into the United States. *Id.* The United States requires Mexican professionals, unlike Canadians, to present a non-immigrant visa, a prior petition by an employer, a Department of Labor attestation, and proof of Mexican citizenship. *Id.* at 134-37. Mexicans are also required to present nonimmigrant visas for spouses and minor children in addition to proof of citizenship, while Canadians need only provide proof of citizenship. *Id.* at 134, 140; see also Harry J. Joe, *Temporary Entry of Business Persons to the United States Under the North American Free Trade Agreement*, 8 GEO. IMMIGR. L.J. 391, 400, 410 (1994); 139 CONG. REC. H9875, H9891 (daily ed. Nov. 17, 1993) (statement of Rep. Tucker) [hereinafter NAFTA Hearing].

⁸⁷ NAFTA, *supra* note 83, at 667. Annex 1603, Section D of NAFTA provides:

[A] Party may establish an annual numerical limit, which shall be set out in Appendix 1603.D.4, regarding temporary entry of business persons of another Party seeking to engage in business activities at a professional level in a profession set out in Appendix 1603.D.1, if the Parties concerned have not agreed otherwise prior to the date of entry into force of this Agreement for those Parties. In establishing such a limit, the Party shall consult with the other Party concerned

Beginning on the date of entry into force of this Agreement as between the United States and Mexico, the United States shall annually approve as many as 5,500 initial petitions of business persons of Mexico seeking temporary entry under Section D of Annex 1603 to engage in a business activity at a professional level in a profession set out in Appendix 1603.D.1.

Id. at 667-70; see also INA § 214(e)(3), 8 U.S.C. § 1184(e)(3) (1994) (determining that "[t]he Attorney General shall establish an annual numerical limit on admissions under paragraph (2) of aliens who are citizens of Mexico . . ."); Wunsch, *supra* note 85, at 134-35.

⁸⁸ NAFTA Hearing, *supra* note 86. "All of the proponents of NAFTA stacked up together cannot deny the fact that there is an eight-to-one wage disparity between Mexico and the United States. Over the last 12 years, the wages in the United States and Canada have gone up, but in Mexico they have not." *Id.*; see also Wunsch, *supra* note 85, at 140. The author relates:

[Ross] Perot's remarks about Mexico during the debate were revealing. Perot depicted Mexico as a land of poverty, shanty towns, pollution, and labor violence where thirty-six families own over one-half [sic] of the national wealth and virtually everyone else dreams of having an outhouse and running water. Perot asserted, 'Livestock in the United States and animals have a better life than good, decent, hardworking Mexicans.' All in all, Perot characterized Mexico as an unfit partner for

202 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

D. The Supreme Court Examines the Rights of Undocumented Immigrants Under the United States Constitution

Despite the heightened control of the border during the 1950s and the 1960s, illegal immigration continued to increase, and states attempted to resolve the problem themselves.⁹⁰ They began to pass laws conditioning the receipt of benefits, such as education and welfare, on citizenship.⁹¹ As a result, the Supreme Court intervened to determine the rights of immigrants illegally residing in the country.⁹²

a free trade agreement, and he asserted that, in any event, Mexicans were too poor to buy U.S.-made consumer goods.

Wunsch, *supra* note 85, at 140.

⁸⁹ *Id.* at 127.

⁹⁰ Grandrath, *supra* note 3, at 772 ("As illegal immigration has increased and the federal government has been unable to effectively combat the problem, some states have alternatively tried to solve the problem by themselves."); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 123 (1994) ("High-impact states have taken such action against undocumented aliens as is permitted under existing legal constraints and would rush to broader measures were those constraints breached."); see also *Plyler v. Doe*, 457 U.S. 202 (1982) (reviewing the constitutionality of a Texas law requiring illegal immigrants to pay tuition when enrolling in public school); *Graham v. Richardson*, 403 U.S. 365 (1971) (invalidating Arizona and Pennsylvania laws conditioning welfare benefits on U.S. citizenship based on violation of Equal Protection).

⁹¹ *Richardson v. Graham*, 313 F. Supp. 34, 35 (D.C. Ariz. 1970) (citing ARIZ. REV. STAT. § 46 (1969)). The Arizona statute required the following:

§ 46-233. Eligibility for general assistance

A. No person shall be entitled to general assistance who does not meet and maintain the following requirement:

1. Is a citizen of the United States, or has resided in the United States a total of fifteen years.

§ 46-272. Eligibility for blind assistance

Assistance shall be granted to any person who meets and maintains the following requirement:

4. Is a citizen of the United States, or has resided in the United States a total of fifteen years.

§ 46-252. Eligibility for old age assistance

Assistance shall be granted under this article to any person who meets and maintains the following requirement:

2. Is a citizen of the United States, or has resided in the United States a total of fifteen years.

Id.; *Leger v. Sailer*, 321 F. Supp. 250, 251 (D.C. Pa. 1970) (citing PA. STAT. ANN. tit. 62, § 432 (West 1970)). The Pennsylvania statute stated:

Section 432. Eligibility.

Except as hereinafter otherwise provided, and subject to the rules, regulations, and standards established by the department, both as to eligibility for assistance and as to its nature and extent, needy persons of the classes defined in clauses (1) and (2) of this section shall be eligible for assistance:

In *Mathews v. Diaz*,⁹³ the Court determined that the Fifth and Fourteenth Amendments protect the millions of aliens within the jurisdiction of the United States from "deprivation of life, liberty, or property without due process of law."⁹⁴ The Court held that federal classifications affecting illegal aliens were subject only to a rational basis standard of review, in light of Congress' plenary powers to regulate immigration.⁹⁵ Congress only had to show that the law was rationally

(1) Persons for whose assistance Federal financial participation is available to the Commonwealth

(2) Other persons who are citizens of the United States, or who, during the period January 1, 1938 to December 31, 1939, filed their declaration of intention to become citizens.

Leger, 321 F. Supp. at 251; *Doe v. Plyler*, 458 F. Supp. 569, 572 (D.C. Tex. 1978) (citing TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1976)). The Texas statute provided in pertinent part:

The Tyler Independent School District shall enroll all qualified students who are citizens of the United States or legally admitted aliens, and who are residents of this school district, free of tuition charge. Illegal alien children may enroll and attend schools in the Tyler Independent School District by payment of the full tuition fee. A legally admitted alien is one who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation.

Doe, 458 F. Supp. at 572.

⁹² *Plyler*, 457 U.S. at 202 (holding that Texas could not exclude children of illegal immigrants from its public education system).

⁹³ 426 U.S. 67 (1976).

⁹⁴ *Id.* at 77. "Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Id.*; see also *Zadvydas v. Davis*, 121 S. Ct. 2491, 2500 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, *unlawful*, temporary, or permanent.") (emphasis added); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). *Wong* stated:

Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.

Wong, 163 U.S. at 238; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (establishing that the Equal Protection clause provisions "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality").

⁹⁵ *Diaz*, 426 U.S. at 83; see also *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). The opinion sets forth:

It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the

204 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

related to a legitimate government purpose to survive rational basis review.⁹⁶

The Supreme Court considered immigrants' rights under state law in *Sugarman v. Dougall*.⁹⁷ The Court subjected the state legislation to a strict scrutiny review, a standard it had previously reserved for classifications based on race and national origin.⁹⁸ For classifications based on citizenship, state legislatures had to demonstrate: first, that they had a compelling interest for laws classifying immigrants and, second, that the means used were narrowly tailored to achieve the interests.⁹⁹ The Court

conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Harisiades, 342 U.S. at 588-89.

⁹⁶ *Diaz*, 426 U.S. at 83 ("Since neither requirement is wholly irrational, this case essentially involves nothing more than a claim that it would have been more reasonable for Congress to select somewhat different requirements of the same kind."); see also *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993) ("a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938). The opinion explains:

Even in the absence of such aids the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

Carolene Prods., 304 U.S. at 152.

⁹⁷ 413 U.S. 634 (1973).

⁹⁸ *Id.* at 642 ("[T]he State's power to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214 (1995) (affirming that "distinctions between citizens solely because of their ancestry are by their very nature odious . . ."); *Richmond v. J.A. Croson*, 488 U.S. 469, 472 (1989) (revealing that race is considered a suspect class due to its unchangeable and distinct nature coupled with a long history of segregation and discrimination); *Carolene Prods.*, 304 U.S. at 153 n.4 ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

⁹⁹ *J.A. Croson*, 488 U.S. at 493 ("The test . . . ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) ("When they touch upon an individual's race or ethnic

justified the stricter standard for states by pointing out that aliens as a class are a "prime example of a discrete and insular minority."¹⁰⁰

Most recently, in *Plyler v. Doe*,¹⁰¹ a class action lawsuit on behalf of school-age illegal immigrant children in Texas, the Court again reviewed the rights of illegal immigrants.¹⁰² It struck down the Texas law that required children of illegal immigrants to pay tuition in order to receive public school education, determining that it violated the Equal Protection Clause.¹⁰³ The Court reasserted that, regardless of a person's status as an illegal alien under immigration law, he or she is still a person under the Constitution, and thus guaranteed equal protection under the Fourteenth Amendment.¹⁰⁴ The Court further concluded that persons who have entered the state illegally are still "within the jurisdiction of a state" because Congress intended the jurisdictional phrase to be broad; therefore, they are entitled to Fourteenth Amendment protection.¹⁰⁵

Nonetheless, rather than applying strict scrutiny as it had previously, the Court applied an intermediate level of scrutiny, which it had reserved for classifications based on gender and illegitimacy.¹⁰⁶ The

background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.").

¹⁰⁰ *Sugarman*, 413 U.S. at 642; *Graham*, 403 U.S. at 372; see also *Carolene Prods.*, 304 U.S. at 153 n.4 ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

¹⁰¹ 457 U.S. 202 (1982).

¹⁰² *Id.* at 205.

¹⁰³ *Id.* at 221-22.

¹⁰⁴ *Id.* at 210; see also U.S. CONST. amend. XIV, § 1. The Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

¹⁰⁵ *Plyler*, 457 U.S. at 213. The case states:

Although the congressional debate concerning § 1 of the Fourteenth Amendment was limited, that debate clearly confirms the understanding that the phrase 'within its jurisdiction' was intended in a broad sense to offer the guarantee of equal protection to all within a State's boundaries, and to all upon whom the State would impose the obligations of its laws.

Id. at 214.

¹⁰⁶ *Id.* at 224 ("[T]he discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State."); see also *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying an "intermediary" level of scrutiny to gender discrimination and

206 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

Court based its decision on the fact that Texas attempted to deprive children of education, and although not a fundamental right, education is extremely important to success in life.¹⁰⁷ The Court further reasoned that children of illegal immigrants should not be punished because they "can affect neither their parents' conduct nor their own status."¹⁰⁸ Thus, the Court continued the pattern of inconsistent immigration policy by subjecting state and federal immigration laws to differing standards of review.¹⁰⁹

III. INCONSISTENT IMMIGRATION POLICIES RAISE EQUAL PROTECTION CONCERNS UNDER THE UNITED STATES CONSTITUTION

The evolution of immigration law in the United States lays the foundation for understanding the illegal immigrant's current status under federal and state law. This Part discusses the significant equal protection concerns raised by the inconsistent application of federal immigration law on the Canadian and Mexican borders.¹¹⁰ Subpart A examines the constitutional implications of selectively enforcing immigration law.¹¹¹ Subpart B analyzes immigration law's disparate impact on illegal immigrants of Mexican origin to determine if the federal policies constitute de jure discrimination.¹¹² Lastly, Subpart C examines illegal immigrants' constitutional status as a suspect group meriting heightened protection under the United States Constitution.¹¹³

A. Selective Enforcement of Immigration Laws Violates the Equal Protection Clause

The Equal Protection Clause of the United States Constitution demands that "[n]o State shall . . . deny to any person within its

revealing that in order "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

¹⁰⁷ *Plyler*, 457 U.S. at 203. "Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage: the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement." *Id.*

¹⁰⁸ *Id.* at 220.

¹⁰⁹ *Id.* at 219; *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973).

¹¹⁰ See *infra* Part III (discussing the constitutional implications of the inconsistent application of federal immigration law).

¹¹¹ See *infra* Part III.A (discussing the equal protection concerns raised by selective enforcement of immigration law).

¹¹² See *infra* Part III.B (discussing immigration law's disparate impact).

¹¹³ See *infra* Part III.C (discussing illegal immigrants' qualification for a strict scrutiny standard of review).

jurisdiction the equal protection of the laws."¹¹⁴ The Supreme Court has thus construed the Fifth and Fourteenth Amendments to require the government to treat "similarly situated" persons alike.¹¹⁵ *Plyler v. Doe* established that illegal immigrants fall under the federal government's "broad" jurisdiction, therefore entitling them to be treated the same as those who are similarly situated, namely other illegal immigrants.¹¹⁶

However, by intentionally enforcing immigration laws more strictly on the Mexican border but leaving the Canadian border largely unpatrolled, Congress is selectively enforcing its immigration policy against Mexican immigrants, thereby violating those immigrants' constitutional right to equal protection under the law.¹¹⁷ The Mexican border receives one border patrol agent for every half of a mile, whereas the Canadian border receives one border patrol agent for every thirteen miles.¹¹⁸ Additionally, for every one immigrant entering the country illegally from Mexico, the government devotes twenty-five percent more manpower than it does for every one immigrant entering from Canada.¹¹⁹

The Supreme Court has previously determined the inconsistent enforcement of laws to be invalid.¹²⁰ In *Yick Wo v. Hopkins*,¹²¹ the Supreme Court struck down California's facially neutral law requiring permits for wood laundries.¹²² Although the law did not explicitly target

¹¹⁴ U.S. CONST. amend. XIV; see also U.S. CONST. amend. V; *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (revealing that the Equal Protection Clause is "inferred from the Fifth [Amendment]").

¹¹⁵ *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Allegheny Pittsburgh Coal Co. v. County Comm.*, 488 U.S. 336, 346 (1989); *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918) ("The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.").

¹¹⁶ 457 U.S. 202, 211-13 (1982).

¹¹⁷ U.S. CONST. amend. XIV; see also U.S. CONST. amend. V.

¹¹⁸ Donna Leinwand, *Report: Canada-USA Border Full of Holes, Illegal Immigrants, Sinugglers Have Little Trouble Getting In*, USA TODAY, July 14, 2000, at 3A (revealing that 7700 agents patrol the Mexican border, and only about 300 agents guard the equally long Canadian border).

¹¹⁹ *Id.*; U.S. Department of Justice, Immigration and Naturalization Service, *Country of Origin*, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/299.htm> (last visited July 7, 2001) (projecting an 154,000 annual increase in Mexican undocumented migrants and an 8000 increase in Canadian undocumented migrants).

¹²⁰ See generally *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹²¹ 118 U.S. 356 (1886).

¹²² *Id.* at 357-58 (citing SAN FRANCISCO, CAL. CODE §§ 1569, 1587). The Ordinance required of laundry buildings:

208 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

any particular racial group, San Francisco selectively enforced it against Chinese laundry owners.¹²³ The Court reasoned that "[c]lass legislation, discriminating against some and favoring others, is prohibited . . ."¹²⁴ Regardless of the fact that the launderers disobeyed the ordinance, and thus were disregarding the law, they were still entitled to be treated the same as others who were disobeying the ordinance.¹²⁵ The Court explained, "in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."¹²⁶ Therefore, it did not permit San Francisco to selectively punish violators of the law.¹²⁷

The people of the city and county of San Francisco do ordain as follows:

SEC. 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

SEC. 2. It shall be unlawful for any person to erect, build, or maintain, or cause to be erected, built, or maintained, over or upon the roof of any building now erected or which may hereafter be erected within the limits of said city and county, any scaffolding, without first obtaining the written permission of the board of supervisors, which permit shall state fully for what purpose said scaffolding is to be erected and used, and such scaffolding shall not be used for any other purpose than that designated in such permit.

SEC. 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment.

SEC. 68. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

Id.; see also SAN FRANCISCO, CAL. CODE §§ 1569, 1587 (West 1880).

¹²³ *Yick Wo*, 118 U.S. at 366 ("They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons . . .").

¹²⁴ *Id.* at 368.

¹²⁵ *Id.* at 367.

¹²⁶ *Id.* at 367-68. The case explained:

[E]qual protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and

Likewise, immigration laws must be enforced equally with respect to all who enter the country illegally.¹²⁸ *Yick Wo* established that the federal government cannot use as a justification the fact that undocumented immigrants are breaking the law, and so lose their protection.¹²⁹ The Fifth Amendment requires that immigrants who illegally cross the United States borders be treated the same as others also choosing to circumvent the laws.¹³⁰ By allowing immigrants of one nationality to ignore immigration laws, while prosecuting immigrants of another nationality, the federal government is selectively enforcing the laws and violating the Equal Protection Clause.¹³¹

Nonetheless, in *Reno v. American-Arab Anti-Discrimination Committee*,¹³² the Supreme Court asserted that selective prosecution cases are extremely rare because they invade the Executive Branch's special province of prosecutorial discretion.¹³³ The Court further determined that immigrants illegally present in the United States generally have no constitutional right to claim selective enforcement as a defense against their deportation.¹³⁴ The holding, however, is limited to the narrow context of deportation hearings.¹³⁵ The Court found that illegal immigrants selectively singled out for deportation due to their possible membership in an organization that supports terrorism may not rely on the Constitution for recourse.¹³⁶ In defending such a case, the Court asserted that the government would be forced to disclose more than just

acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences.

Id.

¹²⁷ *Id.* at 367.

¹²⁸ *Id.* at 368.

¹²⁹ *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886).

¹³⁰ *Id.*

¹³¹ *Id.* at 368-69.

¹³² 525 U.S. 471 (1999).

¹³³ *Id.* at 489.

¹³⁴ *Id.* at 488.

¹³⁵ *Id.* at 491-92 ("When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by *deporting* him . . .") (emphasis added).

¹³⁶ *Id.* at 490-91.

210 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

the normal law enforcement priorities and techniques; it would often have to reveal foreign policy objectives and foreign intelligence products and techniques.¹³⁷ The Court has historically been willing to grant the federal government greater power when dealing with persons who threaten national security.¹³⁸ Moreover, in the recent case of *Zadvydas v. Davis*,¹³⁹ the Court signaled a departure from its previous assertions regarding aliens' constitutional rights, establishing that the executive and legislative branches' power over immigration "is [likewise] subject to important constitutional limitations."¹⁴⁰

B. Immigration Law's Disparate Impact Constitutes De Jure Discrimination

Even if immigrants entering the country cannot challenge border policies under the selective enforcement provisions of the Constitution, immigration law also implicates the Equal Protection Clause because it has a disparate impact on immigrants originating from Mexico.¹⁴¹ The Court has previously determined that laws with a mere disparate impact on a protected group will not violate equal protection absent intent; however, stark statistics will shift the burden to the government to prove that the disparity is not the product of an illicit motive or de jure discrimination.¹⁴² In *Castaneda v. Partida*,¹⁴³ Mexican-Americans consisted of approximately eighty percent of the population but only thirty-nine percent of the citizens summoned for grand jury service.¹⁴⁴ The Supreme Court found the statistics stark enough to shift the burden of proof to the government, and thus violate equal protection even though there was no direct evidence that the government was motivated by a discriminatory intent.¹⁴⁵

¹³⁷ *Id.*

¹³⁸ *Jay v. Boyd*, 351 U.S. 345, 358-60 (1956) (upholding the use of classified information that is unavailable to an alien in deportation hearings where the national security is implicated).

¹³⁹ 121 S. Ct. 2491 (2001).

¹⁴⁰ *Id.* at 2501.

¹⁴¹ See *infra* Part III.B (discussing immigration law's disparate impact on immigrants from Mexico).

¹⁴² *Pers. Adm'r v. Feeney*, 442 U.S. 256, 273 (1979) (explaining that "the Fourteenth Amendment guarantees equal laws, not equal results"). But see *Castaneda v. Partida*, 430 U.S. 482, 511 (1977) (pointing out that stark statistics will create a prima facie case of discrimination and shift the burden of proof to the state).

¹⁴³ 430 U.S. 482 (1977).

¹⁴⁴ *Id.* at 486-87 ("Respondent's data compiled from the Hidalgo County grand jury records from 1962 to 1972 showed that over that period, the average percentage of Spanish-surnamed grand jurors was 39%.").

¹⁴⁵ *Id.* at 500-01.

Similarly, the federal immigration statute, the IIRIRA, disparately impacts illegal immigrants from Mexico.¹⁴⁶ In fact, United States immigration statistics are even more severe than those in *Castaneda*.¹⁴⁷ Only 300 agents patrol the Canadian border, while 7700 patrol the equivalently long Mexican border, evidencing a ninety-six percent disparity in forces compared to *Castaneda's* thirty-nine percent.¹⁴⁸ Further statistics establish more inequality with respect to the two borders: under NAFTA, Canada is not subject to a quota at all, but Mexico may only admit 5500 workers to the United States.¹⁴⁹ Most strikingly, the Border Patrol apprehended only twenty-eight percent of the estimated number of immigrants attempting to cross into the United States from Canada but apprehended ninety-one percent of the estimated number of immigrants attempting to enter from Mexico.¹⁵⁰ Thus, the stark statistics shift the burden to Congress to prove that it has implemented a neutral immigration policy, and thus heightens the standard of review to which the federal laws are subject.

C. Federal Immigration Law Should Be Subject to Strict Scrutiny Review

When analyzing the impact of federal legislation on illegal immigrants, the Supreme Court should employ strict scrutiny review and require the federal government to show: first, that it has a compelling interest in classifying illegal immigrants, and second, that the legislation is narrowly tailored to achieve the interest.¹⁵¹ Without explicitly overruling earlier cases, *Plyler v. Doe* appears to use intermediate scrutiny to review state legislation, based on the premise that education and children are implicated. However, in *Sugarman v. Dougall*, the Court established that state legislation impacting immigrants is subject to strict scrutiny review.¹⁵² As a result, the level of

¹⁴⁶ See *supra* Part II.C; see also IIRIRA, Pub. L. No. 104-208, § 101(a), 110 Stat. 3009-546 (1996).

¹⁴⁷ See *infra* notes 151-53 and accompanying text (discussing immigration law's stark statistics).

¹⁴⁸ Leinwand, *supra* note 118, at 3A.

¹⁴⁹ See *supra* notes 85-91 and accompanying text.

¹⁵⁰ U.S. Department of Justice, Immigration and Naturalization Service, *Immigration Fact Sheet: Country of Origin*, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/299.htm> (last visited Feb. 19, 2001) (revealing the estimated number of undocumented immigrants living in the United States and the number of undocumented immigrants apprehended based on their country of origin).

¹⁵¹ See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978).

¹⁵² 413 U.S. 634, 642 (1973) (determining that state legislation affecting illegal immigrants is subject to strict scrutiny review); see also *Plyler v. Doe*, 457 U.S. 202 (1982) (applying an intermediate level of scrutiny to Texas legislation, stating that education is an important

212 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

immigrants' constitutional protection is unclear, and federal and state laws are subject to differing standards of review because the Court has only required federal legislation to satisfy a rational basis standard.¹⁵³

This difference in standards was eliminated in *Adarand Constructors, Inc. v. Peña*,¹⁵⁴ where the Supreme Court determined that the Equal Protection Clauses of the Fifth and Fourteenth Amendments are identical; therefore, the federal government is subject to the same standard of review as states when making race-based classifications.¹⁵⁵ State and federal laws cannot be subject to different standards of review.¹⁵⁶ The Court found that, although the previous cases only required Congress to meet the same standard as states with respect to school segregation, their "reasoning was not so limited," and should be extended to all equal protection jurisprudence.¹⁵⁷ Thus, when creating classifications based on citizenship, the federal government should be subject to the same constitutional standard of review as the states.¹⁵⁸ Although the government's plenary immigration powers may distinguish alienage classifications from the racial classifications in *Adarand*, it is not entitled to the usual deference when discriminately enforcing its laws.¹⁵⁹ Furthermore, in recent immigration cases, the Supreme Court has been reluctant to rely on the plenary powers doctrine, instead finding alternative reasoning on which to base its decisions; the recent trend may indicate the Supreme Court's willingness to abandon the harsh doctrine.¹⁶⁰

interest, although not a fundamental right, and children of illegal immigrants should not be excluded simply because of their parent's choices).

¹⁵³ See *Mathews v. Diaz*, 426 U.S. 67, 83 (1976); see also *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

¹⁵⁴ 515 U.S. 200 (1995).

¹⁵⁵ *Id.* at 215 (invalidating minority preference for federal contracts); see also *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

¹⁵⁶ *Adarand*, 515 U.S. at 215.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 216; *Bolling*, 347 U.S. at 499; *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896) ("[T]he Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race.").

¹⁵⁹ *Adarand*, 515 U.S. at 216.

¹⁶⁰ *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001) (holding that the INS may not detain an alien indefinitely because the INA implicitly contains a reasonableness limitation); *INS v. St. Cyr*, 121 S. Ct. 2271 (2001) (determining that the Antiterrorism and Effective Death Penalty Act and IIRIRA do not divest the courts of jurisdiction to review an alien's habeas petition and

Federal classifications pose the same threats as state classifications. As the Supreme Court previously asserted, "aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."¹⁶¹ Just as the federal government was not immune to the concerns of race discrimination in *Adarand*, it is not immune to the concerns of discrimination based on alienage, and so should be held to the same standard as the states.¹⁶² In *Plyler v. Doe*, the Supreme Court's determination that adult illegal immigrants do not warrant heightened protection under the Fourteenth Amendment, is misguided.¹⁶³ The Court has previously held that race and national origin qualify as suspect classes, receiving heightened protection under the Constitution. It has explained that distinctions based on race are subject to strict scrutiny because racial minorities are "discrete and insular."¹⁶⁴

Laws that impact Mexican migrants differently than Canadian migrants should be subject to strict scrutiny simply due to the fact that they discriminate against migrants based on their national origin. Nonetheless, the laws can also be challenged because illegal immigrants are a suspect class. Similar to African Americans and many other racial minorities, undocumented immigrants are a "discrete and insular" minority.¹⁶⁵ They, like racial minorities, have been historically segregated and isolated.¹⁶⁶ In times of economic depression, immigrants have been targeted by laws aiming to separate them from United States citizens by way of deportation or strict quotas.¹⁶⁷ Furthermore, strict quotas make a change of status from illegal to legal almost impossible for

do not apply a repeal of discretionary relief retroactively to aliens who pleaded guilty to crimes prior to the statutes' enactment); *Nguyen v. INS*, 121 S. Ct. 2053 (2001) (finding that a statute making citizenship applications more difficult for children born outside of the United States to unmarried male citizens than for children born to female citizens did not violate the Equal Protection Clause); see also Trevor Morrison, *The Supreme Court and Immigration Law: A New Commitment to Avoiding Hard Constitutional Questions?*, available at http://writ.news.findlaw.com/commentary/20010731_morrison.html (last visited July 31, 2001).

¹⁶¹ *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

¹⁶² *Adarand*, 515 U.S. at 227.

¹⁶³ See *Plyler v. Doe*, 457 U.S. 202 (1982).

¹⁶⁴ *Adarand*, 515 U.S. at 200; *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 472 (1989); see also *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁶⁵ See *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973); *Graham*, 403 U.S. at 372.

¹⁶⁶ See *supra* Part II (discussing the United States' segregation and isolation of immigrants).

¹⁶⁷ *Ting*, *supra* note 2, at 301-02 (detailing the ill-treatment and deportation of immigrants during times of economic depression); *Vaughns*, *supra* note 3, at 50.

214 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

most immigrants, much like racial minorities are unable to change their color.¹⁶⁸

Additionally, both racial minorities and immigrants are visibly distinct, and thus "discrete."¹⁶⁹ They are also often readily determinable by their language or accent, and thus easily fall victim to deliberate and unequal treatment as a result of stereotypes not truly reflecting their individual capabilities.¹⁷⁰ Because illegal immigrants are a class of individuals sharing many characteristics with racial minorities, a suspect class, they too should be afforded strict scrutiny protection.¹⁷¹

Such protection will require the federal government to satisfy a two-prong test.¹⁷² It first must establish a compelling interest to create distinct laws for Canadian and Mexican migrants, and second, it must show the laws are narrowly tailored to attain that interest.¹⁷³ The burden of proof will thus rest on Congress to show why it seeks to prevent only certain groups from immigrating to the United States.¹⁷⁴ Congress may attempt to avoid judicial scrutiny by asserting that its plenary power to create immigration law establishes a compelling interest in monitoring the border.¹⁷⁵ Nonetheless, the Court has recently held that Congress' plenary power over immigration is subject to constitutional limitations.¹⁷⁶

Additionally, the federal government also has a compelling interest in preserving and protecting life, specifically, the life of the illegal immigrant that is often lost while traversing dangerous terrain.¹⁷⁷ Citizenship status does not make a person's life less valuable. The federal government has an "important and legitimate interest in

¹⁶⁸ Immigration and Nationality Act of June 27, 1952, ch. 477, 66 Stat. 163 (creating quotas based on national origins and making naturalization more rigorous); see also NAFTA, *supra* note 83, at 667.

¹⁶⁹ *Adarand*, 515 U.S. at 200; *Graham*, 403 U.S. at 372.

¹⁷⁰ *Graham*, 403 U.S. at 372.

¹⁷¹ *Adarand*, 515 U.S. at 214; *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 472 (1989); see also *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁷² See, e.g., *Adarand*, 515 U.S. at 202; *J.A. Croson*, 488 U.S. at 472.

¹⁷³ *J.A. Croson*, 488 U.S. at 472.

¹⁷⁴ *Id.* at 495.

¹⁷⁵ U.S. Department of Justice, Immigration and Naturalization Service, *Illegal Alien Resident Population*, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm> (last visited June 30, 2001); see also Smith, *Criminal*, *supra* note 2, at 171; Tessier, *supra* note 21, at 212.

¹⁷⁶ *Zadvydas v. Davis*, 121 S. Ct. 2491, 2501 (2001).

¹⁷⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 520 (1989); *Roe v. Wade*, 410 U.S. 113, 163 (1973); see also *infra* Part V.B.

potential life" which becomes "compelling" at viability.¹⁷⁸ The Supreme Court has repeatedly asserted the government's interest in protecting and preserving life in cases such as *Webster v. Reproductive Health Services*.¹⁷⁹ An illegal immigrant is not a potential life, but an actual and viable life. Even though immigrants may be voluntarily jeopardizing their own lives, the government still has an interest in preserving their lives.¹⁸⁰ The interest is similar to the government's interest in preserving the life of a woman in a vegetative state, as held in *Cruzan v. Director, Missouri Department of Health*.¹⁸¹ In *Cruzan*, the woman had previously indicated that she did not want her life to be sustained if she was ever in such a condition, and so chose to give up her life; similarly, illegal immigrants choose to risk their lives by crossing the border.¹⁸² Nonetheless, the Court found that the state still had an interest in preserving her life.¹⁸³ Thus, the government should also have a compelling interest in protecting an illegal immigrant's life. Inconsistent immigration laws that result in the deaths of many migrants contradict the federal government's interest.¹⁸⁴ Moreover, Congress must show why its interest in keeping certain immigrants out of the country for strictly economic reasons outweighs the federal government's interest in protecting life.¹⁸⁵ The Supreme Court has previously determined that such a balance must err on the side of preserving life.¹⁸⁶

Even if a court finds that the state's interest in monitoring its borders outweighs its interest in preserving life, the means that the government

¹⁷⁸ *Roe*, 410 U.S. at 163 (establishing that the state has an "important and legitimate interest" in protecting and preserving life, and the "compelling" point is at viability).

¹⁷⁹ 492 U.S. 490, 520 (1989); see also *Casey*, 505 U.S. at 871; *Roe*, 410 U.S. at 163.

¹⁸⁰ See generally *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 283 (1990).

¹⁸¹ 497 U.S. 261, 283 (1990).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See *infra* Part V.B (discussing the role of inconsistent laws in the deaths of illegal immigrants).

¹⁸⁵ *Roe v. Wade*, 410 U.S. 113, 163 (1973).

¹⁸⁶ *Cruzan*, 497 U.S. at 283. The case asserts:

An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction.

Id.

216 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

uses to patrol its borders are not narrowly tailored to its goal. In *Regents of University of California v. Bakke*,¹⁸⁷ the Supreme Court rejected a medical school's program that reserved sixteen seats for minority applicants.¹⁸⁸ The Court determined that the program was not narrowly tailored to the school's goal of graduating more doctors willing to practice in minority communities.¹⁸⁹ Instead of basing admission on an applicant's race, the Court suggested that the school should have identified persons who had previously demonstrated their concerns for minorities and expressed a primary professional goal of working with them upon graduation.¹⁹⁰ Similarly, the congressional goal of controlling illegal immigration is not furthered by the current border policies.¹⁹¹ The Mexican and Canadian borders should be fortified in proportion to the number of persons migrating from each country, rather than based on the economic or political standing of each country.¹⁹² By failing to allocate forces in proportion to the number of entries per country, the current border policies create an environment that furthers illegal immigration and, thus, are not narrowly tailored to their goal.¹⁹³ Consequently, because congressional interest in barring the entry of certain immigrants to the United States fails to further the state's compelling interest in preserving life and is not narrowly tailored to the goal of preventing illegal immigration, current immigration law does not meet a strict scrutiny standard of review.¹⁹⁴

IV. PROBLEMS OF ENFORCING INCONSISTENT IMMIGRATION LAW

In order to determine why a need exists in the United States for uniform immigration law, this Part examines the significant public policy concerns that disparate laws raise.¹⁹⁵ This Part begins by discussing the inability of federal immigration law to effectively curb illegal immigration on United States land borders and by addressing

¹⁸⁷ 438 U.S. 265 (1978).

¹⁸⁸ *Id.* at 320.

¹⁸⁹ *Id.* at 310-11.

¹⁹⁰ *Id.* at 311.

¹⁹¹ IIRIRA, Pub. L. No. 104-208 § 101(d)(1), 110 Stat. 3009-546 (1996) (referring to the congressional desire to create a "uniform and visible deterrent" to illegal immigration).

¹⁹² *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 278, 311 (1978) (referring the need to develop "more precise and reliable ways" to achieve a goal).

¹⁹³ See *infra* Part IV.

¹⁹⁴ See *infra* Part VI (proposing a narrowly tailored Model Statute).

¹⁹⁵ See *infra* Part IV (discussing the public policy issues raised by inconsistent immigration laws).

current enforcement policies and their effect.¹⁹⁶ This Part further examines the problematic consequences that an inconsistent immigration law exerts on the northern and southern borders.¹⁹⁷

A. Inconsistent Border Policies Have Sealed Some Areas at the Cost of Exposing Others

To determine the reasons for the failure, one must first focus on the very purpose of placing immigration under federal control.¹⁹⁸ When asserting that the Constitution mandates federal control, the Supreme Court, in *Henderson v. Mayor of New York*,¹⁹⁹ stressed the importance of having uniform laws govern immigrants' admission to the United States, in contrast to the New York, San Francisco, and Boston regulations which were all different.²⁰⁰ However, United States immigration history has revealed that the uniform system of laws is not being applied consistently along all of the United States borders, thus defeating the very purpose of federal control.

The most recent legislation, the IIRIRA and NAFTA, inconsistently govern the Canadian and Mexican borders. The IIRIRA has shifted border patrol forces away from the northern border onto the southern border, leaving the Canadian border exposed.²⁰¹ NAFTA allows an unlimited number of Canadian workers to cross the border, while putting a 5500 yearly cap on Mexican workers.²⁰² Consequently, Congress' desire to create a "uniform and visible deterrent" by enacting the IIRIRA is neither uniform nor a deterrent.²⁰³

The current lack of uniformity has frustrated the United States' attempts to effectively control its borders and deter illegal immigration because border legislation has sealed some areas while leaving holes in others, and is not an effective deterrent.²⁰⁴ Even though the fortified

¹⁹⁶ See *supra* Part III and *infra* Parts IV.A-B and V (discussing current enforcement policies and their effect).

¹⁹⁷ See *infra* Part V.A (discussing the government's inability to deter immigrants due to immigrants' and employers' economic benefits).

¹⁹⁸ See generally *Henderson v. Mayor of New York*, 92 U.S. 259 (1875).

¹⁹⁹ 92 U.S. 259 (1875).

²⁰⁰ *Id.* at 273. See generally *Erie R.R. v. Tompkins*, 304 U.S. 64, 75 (1938) (highlighting the necessity of uniform laws in a federal system of government).

²⁰¹ IIRIRA, Pub. L. No. 104-208 § 101(d)(1), 110 Stat. 3009 (1996).

²⁰² NAFTA, *supra* note 83, at 667.

²⁰³ IIRIRA, Pub. L. No. 104-208 § 101(d)(1), 110 Stat. 3009-546 (1996).

²⁰⁴ See Booth, *supra* note 75, at A1 ("[T]he Border Patrol has made crossing into Texas and California much more difficult, thereby pushing the human traffic into Cochise County in southeast Arizona."); McGarvey, *supra* note 75, at G1 (determining that fortifying the

218 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

areas on the southern border have seen a drop in border patrol arrests, apprehensions have significantly increased in the more rugged, less patrolled areas.²⁰⁵ Mexican migrants merely alter their course through less guarded areas on the southern border – many passing through undetected – and contribute to the population of undocumented Mexican immigrants living in the United States.²⁰⁶ Likewise, by shifting border patrol agents from the northern border to high traffic areas on the southern border in an attempt to put the forces where they are most needed, illegal immigration from Canada has increased.²⁰⁷ Unless Congress allocates sufficient funds to adequately and consistently patrol the entire length of both borders, it will be unable to deter or prevent illegal immigration.²⁰⁸ However, fortifying both borders will be extremely costly for the taxpayers and employers. The result is an ineffectual border patrol that creates problems rather than solutions.²⁰⁹

B. Inconsistent Immigration Policies Result in Increased Illegal Immigration

In addition to ineffectively deterring undocumented migrants, careful analysis shows that inconsistent application of the immigration laws actually increases illegal immigration.²¹⁰ This Subpart details the impact of the inability of current federal immigration laws to successfully control illegal immigration on the United States' northern

border in high traffic areas merely shifts the course of immigrants to less monitored lands); Mendel, *supra* note 75, at A3 ("Tighter border controls in California have made the Arizona border one of the main entry points for illegal immigrants."); Munoz, *supra* note 75, at B9 ("Effective border control programs in California and Texas have shifted the action, particularly to the Douglas-Nogales region, which has been flooded with many hundreds of illegal crossings every day."); Smith, *Patrol*, *supra* note 75, at 4A ("As the Border Patrol stepped up enforcement in the El Paso and San Diego metropolitan areas in the mid-1990s, the illegal migratory flow from Mexico shifted to Arizona's rural center.").

²⁰⁵ See Baldauf, *supra* note 79, at 1 (revealing that border patrol agents are catching more than 60,000 illegal immigrants a month in southern Arizona); Branigin, *supra* note 79, at A2; Gross, *supra* note 79, at B1.

²⁰⁶ See U.S. Department of Justice, 1996 *Stat. Y.B. of the Immigr. & Naturalization Service* 197 (1997), available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm> (last visited Feb. 19, 2001); see also Smith, *Criminal*, *supra* note 2, at 171; Tessier, *supra* note 21, at 212 (referring to California Governor Pete Wilson's remark, 'Crossing America's southern border is easier than crossing most streets in Los Angeles.').

²⁰⁷ See *infra* Part IV.B (discussing increased Canadian illegal immigration).

²⁰⁸ *The Rights of Undocumented Aliens*, 96 HARV. L. REV. 1433, 1439 (1983) ("The notorious underfunding of the INS ensures that only a small percentage of persons entering the country illegally are ever caught . . .").

²⁰⁹ See *supra* Part IV.A (discussing an inconsistent border policy's costly effects).

²¹⁰ See *infra* Part IV.B (discussing an increase in illegal immigration due to inconsistent laws).

and southern borders.²¹¹ The inconsistent policies have not only resulted in an increase in the number of illegal immigrants residing in the United States, but they have also created substantial safety threats to United States citizens.²¹²

Although the legislative history of the IIRIRA used the illegal entry statistics to justify more border patrol agents, these numbers actually demonstrate the ineffectiveness of current policy.²¹³ As of October 1996, the INS estimated that five million undocumented immigrants were residing in the United States, with the number increasing by 275,000 annually.²¹⁴ Border Patrol apprehensions increased two-fold from 1960 to 1966 and totaled 80,000, with Mexican nationals making up ninety percent.²¹⁵ By 1969, the number had doubled again, and the United States border patrol apprehended 160,000 immigrants.²¹⁶ By 1983, the Border Patrol had arrested slightly more than one million immigrants on the southern border.²¹⁷

Additionally, because the growing number of border patrol agents are stationed in high traffic areas, immigration has increased in more rural, less guarded territory.²¹⁸ Migrants have altered their course and now travel through places such as rural Arizona.²¹⁹ Agents in the

²¹¹ See *infra* Part IV.B (discussing federal immigration law's inability to successfully control illegal immigration on the borders).

²¹² See *infra* notes 239-45 and accompanying text (discussing the dangers to United States citizens); see also Susan Gilmore, *U.S. Border Becomes as Porous on its North Face as on its South*, THE HOUS. CHRON., Oct. 24, 1999, at A19 [hereinafter Gilmore, *North Face*]; Greg B. Smith, *Suspect in New Year's Plot: I'm Pal, Not Bomber*, N. Y. DAILY NEWS, June 8, 2000, at 38 [hereinafter Smith, *Suspect*]; *Terrorism Suspect Waives Extradition Hearing*, THE N.Y. TIMES, July 18, 2000, at A8 [hereinafter *Terrorism*].

²¹³ H.R. REP. NO. 104-469[II] (1996).

²¹⁴ U.S. Department of Justice, Immigration and Naturalization Service, *Illegal Alien Resident Population*, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm> (last visited Feb. 19, 2001); see also Smith, *Criminal*, *supra* note 2, at 171; Tessier, *supra* note 21, at 212.

²¹⁵ HARWOOD, *supra* note 2, at 6 ("Although border patrol apprehensions in the early 1960s were a modest 30,000 to 40,000 a year . . . , by 1966, the patrol was apprehending 80,000 aliens . . .").

²¹⁶ *Id.*

²¹⁷ *Id.* (citing U.S. Department of Justice, Immigration and Naturalization Service, *FY 1983 Report of Deportable Aliens Found in the U.S. By Nationality, Status at Entry, Place of Entry, Status When Found*, Form G-23.18).

²¹⁸ Booth, *supra* note 75, at A1; McGarvey, *supra* note 75, at G1; Mendel, *supra* note 75, at A3; Munoz, *supra* note 75, at B9; Smith, *Patrol*, *supra* note 75, at 4A.

²¹⁹ Booth, *supra* note 75, at A1 ("[T]he Border Patrol has made crossing into Texas and California much more difficult, thereby pushing the human traffic into Cochise County in southeast Arizona."); McGarvey, *supra* note 75, at G1 (determining that fortifying the

220 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

Tucson Sector, which covers much of Southern Arizona, apprehended 617,000 migrants in 2000.²²⁰ Apprehensions across the entire southwestern border also have escalated as undocumented migrants continue to cross.²²¹ In 1999, the Border Patrol apprehended 1,537,000 illegal immigrants coming in from Mexico.²²² Consequently, by prompting migrants to alter their courses to less patrolled areas, the fortified border actually allows many to pass through undetected and contributes to the estimated 2,700,000 undocumented Mexican immigrants living in the United States.²²³

Canadian immigrants also significantly contribute to the undocumented population in the United States.²²⁴ In 1996, the INS estimated that 120,000 of the five million undocumented immigrants entered at the Canadian border.²²⁵ Canadian immigrants are among the top-ten fastest growing populations of undocumented immigrants,

border in high traffic areas merely shifts the course of immigrants to less monitored lands); Mendel, *supra* note 75, at A3 ("Tighter border controls in California have made the Arizona border one of the main entry points for illegal immigrants."); Munoz, *supra* note 75, at B9 ("Effective border control programs in California and Texas have shifted the action, particularly to the Douglas-Nogales region, which has been flooded with many hundreds of illegal crossings every day."); Smith, *Patrol, supra* note 75, at 4A ("As the Border Patrol stepped up enforcement in the El Paso and San Diego metropolitan areas in the mid-1990s, the illegal migratory flow from Mexico shifted to Arizona's rural center.").

²²⁰ Laurie Goodstein, *Church Group Provides Oasis for Illegal Migrants to U.S.*, N.Y. TIMES, June 10, 2001, at 20; see also Booth, *supra* note 75, at A1.

²²¹ U.S. Department of Justice, Immigration and Naturalization Service, *Southwest Border Apprehensions 1999*, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/msrsep99/SWBORD.HTM> (last visited July 7, 2001).

²²² *Id.*

²²³ U.S. Department of Justice, 1996 *Stat. Y.B. of the Immigr. and Naturalization Service* 197 (1997), available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm> (last visited Feb. 19, 2001); see also Tessier, *supra* note 21, at 212.

²²⁴ U.S. Department of Justice, 1996 *Stat. Y.B. of the Immigr. and Naturalization Service* 197 (1997), available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm> (last visited Sept. 15, 2001); see also Dunne, *supra* note 14, at 633 n.60.

²²⁵ U.S. Department of Justice, 1996 *Stat. Y.B. of the Immigr. and Naturalization Service* 197 (1997), available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm> (last visited Feb. 19, 2001). Canadian immigrants rank second to Latin American immigrants, and are surprisingly higher in number than Haitian immigrants. *Id.* In the 1990 census, aliens born in Canada topped those born in the United Kingdom (322,342), Vietnam (311,463), and China (296,438). <http://www.ins.usdoj.gov/graphics/aboutus/statistics/299.htm>. In 1996, the United Kingdom, Vietnam, and China were not even among the top-ten illegal immigrant populations, and Canada has climbed to number four. *Id.*; see also Dunne, *supra* note 14, at 633 n.60.

increasing by approximately 8000 per year.²²⁶ Canada is also one of the top-ten countries from which aliens apprehended in the United States have come.²²⁷ In 1997, the border patrol arrested 1664 immigrants illegally crossing Canada's borders.²²⁸ The number of arrests rose to 1871 in 1999.²²⁹ In the Spokane sector alone, consisting of only 350 miles of the 4000-mile border, the border patrol had already arrested 1308 border crossers by September of 2000.²³⁰ This is especially significant considering that only 300 agents police Canada's vast border.²³¹

Perhaps more troubling to many United States citizens is the fact that the porous northern border has become a haven for criminals.²³² Even though many Americans do not feel threatened by persons entering the country through the Canadian border because of Canada's solid economy, upstanding citizens are not the only people crossing into the

²²⁶ U.S. Department of Justice, Immigration and Naturalization Service, *Immigration Fact Sheet: Country Origin*, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/299.htm> (last visited Sept. 5, 2001).

²²⁷ *Id.*

²²⁸ Bill Hutchinson, *Haven for Tribe & for Smugglers Cross-Border Site of Mohawk Reservation Brings Traffic in Cigs, Booze, Aliens*, DAILY NEWS, July 23, 2000, at 26.

²²⁹ *Id.*

²³⁰ Dean Paton, *Along the Other US Border, Problems Rise*, THE CHRISTIAN SCI. MONITOR, Sept. 22, 2000, at 3; see also Leinwand, *supra* note 118, at 3A (determining that the entire Canada-United States border extends almost 4000 miles); U.S. Department of Justice, Immigration and Naturalization Service, *Spokane Border Patrol Sector*, available at <http://www.ins.usdoj.gov/graphics/fieldoffices/sectors/spokane/index.htm> (last visited Sept. 5, 2001) (stating that the Spokane Sector polices 350 miles of the border).

²³¹ Leinwand, *supra* note 118, at 3A (indicating that a federal report by the inspector general at the Department of Justice found that fewer than four percent of the nation's Border Patrol agents are assigned to the Canada-USA line, amounting to about 300 agents for almost 4000 miles of border, in contrast to Mexico's border where more than 7700 agents are stationed); see also Susan Gilmore, *INS Report Cites Holes in Border, Southwest Gets Most of Manpower, Leaving the Canadian Frontier Porous*, SEATTLE TIMES, July 8, 2000, at A1 ("A federal report has found that Immigration and Naturalization Service agents along the Canadian border are so overworked, and stations so understaffed, that criminals can practically walk into the U.S. undetected."); Hutchinson, *supra* note 228, at 26 (pointing out that the Mohawk reservation is part of a 261 mile sector patrolled by only 91 United States border patrol agents); Robyn Meredith, *Illegal Immigrants Find Danger and Appeal in Northern Route*, N.Y. TIMES, Feb. 27, 2000, at 22 (revealing that only four officers patrol 140 miles of the United States-Canada coastline); *Other Voices*, THE PLAIN DEALER, Jul. 2000, at 1 ("The U.S.-Canadian border is less secure today because the Immigration and Naturalization Service has plucked border patrol agents from here and scattered them along the U.S.-Mexican border."); Lynn Sweet, *Congress has eye on border*, CHI. SUN-TIMES, Jan. 22, 2000, at 3.

²³² Gilmore, *North Face*, *supra* note 212, at A8; Smith, *Suspect*, *supra* note 212, at 38; *Terrorism*, *supra* note 212, at A8.

222 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

United States.²³³ The northern border is a refuge for both terrorists and drug smugglers.²³⁴ The United States National Drug Policy Council has deemed the northern border a "high-intensity drug-trafficking area."²³⁵ Additionally, because of Canada's extensive borders, civil liberties, and accessible banking systems, it is an attractive place for terrorists to plan overseas attacks.²³⁶ In fact, in 1999, United States authorities arrested a terrorist crossing the United States-Canadian border who planned to bomb millennium celebrations.²³⁷ Instead of alleviating illegal immigration, the inconsistent application of federal immigration law on the United States borders poses tremendous threats to citizens.²³⁸

V. THE UNDOCUMENTED IMMIGRANT'S DILEMMA

In order to determine the proper balance between the competing interests of the federal government and migrants, this Part examines the consequences of the inconsistent application of federal immigration law on the migrant. This Part begins by detailing the incentives motivating immigrants to enter this country illegally.²³⁹ Next, this Part analyzes the dangers that undocumented migrants face while crossing inadequately patrolled terrain.²⁴⁰

A. Inconsistent Immigration Policies Do Not Address Immigration Incentives: The True Heart of the Problem

This Subpart examines the incentives that simultaneously motivate illegal immigration and thwart immigration law. The fundamental law of supply and demand is successfully defeating current immigration

²³³ Gilmore, *North Face*, *supra* note 212, at A8; Smith, *Suspect*, *supra* note 212, at 38; *Terrorism*, *supra* note 212, at A8.

²³⁴ Gilmore, *North Face*, *supra* note 212, at A8; Smith, *Suspect*, *supra* note 212, at 38; *Terrorism*, *supra* note 212, at A8.

²³⁵ Gilmore, *North Face*, *supra* note 212, at A8. The border patrol agency apprehended 74 pounds of marijuana in 1996. *Id.* In 1997, the number jumped to 1166 pounds, an estimated 10% of what actually comes across the border. *Id.*

²³⁶ Smith, *Suspect*, *supra* note 212, at 38; *Terrorism*, *supra* note 212, at A8.

²³⁷ Smith, *Suspect*, *supra* note 212, at 38; *Terrorism*, *supra* note 212, at A8.

²³⁸ Gilmore, *North Face*, *supra* note 212, at A8; Smith, *Suspect*, *supra* note 212, at 38; *Terrorism*, *supra* note 212, at A8.

²³⁹ See *infra* Part V.A (discussing the incentives motivating immigrants to cross the border illegally).

²⁴⁰ See *infra* Part V.B (discussing the dangers facing illegal immigrants while crossing inadequately patrolled terrain).

policies.²⁴¹ As long as United States businesses demand migrant labor, Mexicans, Canadians, and others will emigrate to the United States.²⁴²

The United States is a nation built by immigrants yearning for greater freedom and economic prosperity.²⁴³ Throughout its history, the country has welcomed immigrants who have eagerly satisfied its labor demands.²⁴⁴ Mexican nationals were invited to the country during World War I to work in place of the absent soldiers and have remained ever since.²⁴⁵ Although many citizens consider immigrants to be unwelcome individuals who take American jobs, the reality is that employer prosperity demands immigrant labor.²⁴⁶

The agricultural industry, in particular, depends substantially on migrant workers to satisfy its labor intensive, seasonal demands.²⁴⁷ Migrants also supply a tremendous portion of the work force in the garment industry, janitorial services, construction clean-up, hotels and restaurants, and other seasonal minimum wage jobs that employers have

²⁴¹ H.R. REP. NO. 104-875, available at 1997 WL 10633 (1997); S. REP. NO. 104-249, available at 1996 WL 180026 (1996); Heppel & Torres, *supra* note 14, at 53; Arthur A. Baer, *Latino Human Rights and the Global Economic Order*, 18 CHICANO-LATINO L. REV. 80, 96 (1996); Niel A. Friedman, Comment, *A Human Rights Approach to the Labor Rights of Undocumented Workers*, 74 CAL. L. REV. 1715, 1723 (1986); M. Isabel Medina, *Employer Sanctions in the United States, Canada, and Mexico: Exploring the Criminalization of Immigration Law*, 3 SW. J.L. & TRADE AM. 333, 339 (1996) [hereafter Medina, *Employer*]; Carlos Guerra, *Tougher Drug, Immigration Laws Will Fail*, SAN ANTONIO EXPRESS-NEWS, Oct. 12, 2000, at 1B; Gilberto Hinojosa, *Immigrants? It's the Economy*, SAN ANTONIO EXPRESS-NEWS, Oct. 13, 2000, at 7B.

²⁴² H.R. REP. NO. 104-875, available at 1997 WL 10633 (1997); S. REP. NO. 104-249, available at 1996 WL 180026 (1996); Heppel & Torres, *supra* note 14, at 53; Baer, *supra* note 241, at 96; Friedman, *supra* note 241, at 1723 ("Aliens will immigrate as long as this country offers greater opportunities than the countries they leave behind."); Medina, *Employer*, *supra* note 241, at 339; Guerra, *supra* note 241, at 1B ("If they didn't find work, they would stop going."); Hinojosa, *supra* note 241, at 7B (stating that "ultimately, economic forces control immigration").

²⁴³ HARWOOD, *supra* note 2, at 1 ("[T]he United States is a nation of immigrants . . .").

²⁴⁴ See *supra* note 3 and accompanying text.

²⁴⁵ HARWOOD, *supra* note 2, at 2-3; Heppel & Torres, *supra* note 14, at 53.

²⁴⁶ Dunne, *supra* note 14, at 639; Heppel & Torres, *supra* note 14, at 53; Hing, *supra* note 14, at 82 ("States that have a larger population of immigrants have lower unemployment rates."); Smith, *Criminal*, *supra* note 2, at 185 (providing that there is no correlation between the unemployment of natives and the number of immigrants working in the field).

²⁴⁷ CALAVITA, *supra* note 7, at 7 (revealing that undocumented migrants supply "a substantial portion of the work force in Southwestern agriculture, the garment industry, janitorial services, construction clean-up, hotels and restaurants, and other seasonal and minimum-wage jobs"); Dunne, *supra* note 14, at 639 (detailing the plight of an onion farmer who begged the INS not to deport undocumented migrants working for him because he would suffer from an inadequate labor supply and lose a substantial amount of profits); Heppel & Torres, *supra* note 14, at 53.

224 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

trouble filling with natives who prefer more stable, higher-paying work.²⁴⁸ Although the government has attempted to sanction employers who hire undocumented migrants, businesses find that the benefits of violating the law often outweigh the risks of being caught.²⁴⁹ Consequently, employers will continue to hire undocumented migrants, and migrants, in turn, will continue to immigrate to the United States, undaunted by the prospect of having to alter their routes to more rugged, dangerous paths in search of opportunity and economic prosperity.²⁵⁰

B. Inconsistent Immigration Policies Create Substantial Danger

The consequences of the inconsistent application of federal law on the United States borders extend beyond its inability to thwart illegal

²⁴⁸ CALAVITA, *supra* note 7, at 7; Heppel & Torres, *supra* note 14, at 53 ("[M]any industries in the United States that employ unauthorized workers, particularly labor-intensive agriculture, enjoy a competitive advantage as they can pay significantly lower wages than they would have to pay domestic workers.").

²⁴⁹ Jenifer M. Bosco, *Undocumented Migrants, Economic Justice, and Welfare Reform in California*, 8 GEO. IMMIGR. L.J. 71, 88 (1994) ("Sporadic enforcement of IRCA provisions may help to convince potential border crossers that the risk of illegal immigration is small, and employers may find that the potential costs of hiring undocumented workers (in terms of fines) are small when compared to the costs of operating without low-paid undocumented laborers."); Samantha C. Halem, *Slaves to Fashion: A Thirteenth Amendment Litigation Strategy to Abolish Sweatshops in the Garment Industry*, 36 SAN DIEGO L. REV. 397, 409 (1999) ("Employers hire undocumented immigrants knowing that these workers will not risk deportation to report labor law violations."); Stephen M. Knight, *The First Time as Tragedy, The Second Time Farce: Proposition 187, Section 1981 and the Rights of Aliens*, 15 UCLA PAC. BASIN L.J. 289, 322 n.69 (1997) ("One reason that employers in the United States are willing to risk employer sanctions right now and hire illegal immigrants is because they can get those illegal immigrants at less than the minimum wage, put them in squalid working conditions, and they know that the illegal immigrants are unlikely to complain."); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 690 (1997) [hereinafter Medina, *Criminalization*] (employer sanctions have not been successful at deterring employers from hiring undocumented immigrants because "the risk of being caught is perceived as somewhat small"); Mary Romero, *Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: "Where Can You Find Good Help These Days!"*, 53 U. MIAMI L. REV. 1045, 1052 (1998) ("[T]he low risk involved in hiring undocumented women and not filing income tax or social security supports the lawbreaking activity of white collar crime committed by many employers in domestic service.").

²⁵⁰ Sandra Dibble & S. Lynn Walker, *Zedillo Strictly Business Here; Hails a New Era of Opportunities*, SAN DIEGO UNION-TRIB., May 21, 1999, at A1 ("[T]he economic incentive of migration still exists."); Michael A. Fletcher, *Lifesaving on the Border: INS Bolsters Training to Counter Rise in Migrant Deaths*, WASH. POST, June 27, 2000, at A21 ("Still, the efforts have not managed to stem the desire of the millions of people desperate enough to risk their lives—and the lives of their young children—for a chance to share in the economic opportunity available in the United States.").

immigration. The current border policies resulted in the deaths of more than 350 migrants in 2000, doubling the previous year's count.²⁵¹ Many immigrants are simply missing, either dead or unaccounted for, and their families never find out what became of them.²⁵²

"Vigilante Justice" is perhaps the most sensational and publicized cause of immigrant deaths.²⁵³ Local ranchers in rural areas, such as Arizona, have become frustrated with the influx of border-crossers.²⁵⁴ The ranchers often seek to solve the problem themselves by rounding up migrants at gunpoint.²⁵⁵ Their usual course of action is to hold the immigrants until the Border Patrol arrives; however, a few occasions turned deadly when the ranchers shot their captives.²⁵⁶ Vigilantism has

²⁵¹ James O. Goldsborough, *We Only Pretend to Block Immigration*, THE SAN DIEGO UNION-TRIB., May 17, 1999, at B7; Alison Gregor, *Immigrants Face Deadly Trail: Kennedy Staff Saves Many from Thirst*, SAN ANTONIO EXPRESS-NEWS, Oct. 5, 2000, at 1A [hereafter Gregor, *Deadly*]; Erin Teixeira, *The Hidden Toll; Memorial: Activists Erect 591 Crosses in Remembrance of People Who Lost Their Lives Crossing the Border from Mexico*, L.A. TIMES, Nov. 2, 2000, at B1 ("[M]ore migrants than ever are dying: between fiscal years 1999 and 2000, deaths increased 57% to 369, INS data show."); see also Schmitt, *supra* note 12, at 12 (reporting the Mexican President's deep sadness over the May 2001 deaths of 14 migrants in the Arizona desert).

²⁵² Gregor, *Deadly*, *supra* note 251, at 1A. Many immigrants that die on the border are unidentified; their families never learn what became of their loved ones. *Id.*

²⁵³ Jeff Barker, *Border Vigilantism Assailed; U.S., Mexico Vow to Attack Problem*, THE ARIZ. REPUBLIC, May 19, 2000, at A1; Booth, *supra* note 75, at A1; Goldsborough, *supra* note 251, at B7; Edward Hegstrom, *Tensions on Border Increase; Mexicans Decry Immigrant's Killing*, THE HOUS. CHRON., May 19, 2000, at A1; Howard LaFranchi, *Keeping Mexican Migrants Safer*, THE CHRISTIAN SCI. MONITOR, June 23, 2000, at 8; Jan McGirk, *Mexican Leader Presses Clinton on Border Deaths*, THE INDEP., (London) June 9, 2000, at 15; Smita P. Nordwall, *Mexico Might Sue Arizona Ranchers*, USA TODAY, May 18, 2000, at 11A; Don Reeder, *The Mexican Border War: When Will it End?*, THE STRAITS TIMES (Singapore), Sept. 3, 2000, at 52; Smith, *Patrol*, *supra* note 75, at 4A.

²⁵⁴ Barker, *supra* note 253, at A1; Booth, *supra* note 75, at A1; Goldsborough, *supra* note 251, at B7; Hegstrom, *supra* note 253, at A1; LaFranchi, *supra* note 253, at 8; McGirk, *supra* note 253, at 15; Nordwall, *supra* note 253, at 11A; Reeder, *supra* note 253, at 52; Smith, *Patrol*, *supra* note 75, at 4A.

²⁵⁵ Barker, *supra* note 253, at A1; Booth, *supra* note 75, at A1; Goldsborough, *supra* note 251, at B7; Hegstrom, *supra* note 253, at A1; LaFranchi, *supra* note 253, at 8; McGirk, *supra* note 253, at 15 (revealing that one Arizona rancher and his brother have detained up to 170 migrants a day); Nordwall, *supra* note 253, at 11A; Reeder, *supra* note 253, at 52 (pointing out that one rancher has become a local celebrity, capturing 174 immigrants in a single weekend); Smith, *Patrol*, *supra* note 75, at 4A.

²⁵⁶ Michael J. Nunez, *Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the United States and Mexico*, 43 HASTINGS L.J. 1573, 1575, 1605 n.11 (1992) ("[W]hite vigilante groups . . . hunt the border for easy targets on which to vent their hatred."); *Border Cominandos Go Home*, SAN DIEGO UNION-TRIB., July 22, 1986, at B6 (describing an armed paramilitary group from Alabama that was "[e]quipped with semi-automatic weapons and infrared scopes, [and] the 19-man unit

226 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

received much recent attention due to the death of one Mexican national who approached an Arizona rancher for water.²⁵⁷ When the rancher refused, the migrant and his companion turned to leave, and the rancher shot him in the leg and then left him to bleed to death.²⁵⁸ Nonetheless,

allegedly booby-trapped a road to stop 16 Mexican nationals, who were held at gunpoint before they were turned over to the U.S. Border Patrol."); Hegstrom, *supra* note 253, at A1; J. Harry Jones, *Aliens Hunted By Students, Burgreen Says*, SAN DIEGO UNION-TRIB., Apr. 25, 1990, at B1 ("Undocumented aliens were "hunted" on at least one occasion by high school students participating in war games along the U.S.-Mexico border, Police Chief Bob Burgreen said yesterday."); *Klansmen Will Patrol Texas-Mexican Border*, SAN DIEGO UNION-TRIB., June 6, 1986, at AA11 ("Five armed members of the Ku Klux Klan will patrol the Texas-Mexican border for undocumented aliens this weekend, driving a school bus with the letters KKK on it, their leader said today."); *Rancher Sued Over Slain Immigrant; Mexican Father Seeks \$15 Million from Vigilante*, THE ARIZ. REPUBLIC, July 1, 2000, at B10; Trevino, *supra* note 7, at 87; see also 187's Vigilante 'Enforcers,' CHRISTIAN SCI. MONITOR, Dec. 27, 1994, at 19. The article details non-violent instances of vigilante enforcement in California:

Oxnard: A McDonald's employee requested immigration documents before allowing a customer to purchase food. Stanislaus County: The owner of a hotel called the police when a US citizen of Mexican descent refused to show a green card while registering for a room. San Francisco: An employee of the United Parcel Service told a Latino man that he need not apply for a Christmas job because he was from Mexico. The employee did not check for his work authorization or immigration status before turning him away. Manteca: Police stopped two young women who are permanent legal residents for jaywalking, contacted the Immigration and Naturalization Service, took them 14 miles to Stockton, and released them only when the INS confirmed their legal status. Garden Grove: Employees at a large office-supply store stopped a Latino man who is a US citizen at the door, frisked him, and explained that they were searching everyone who wore a jacket because of a high incidence of robberies. The man waited outside for an hour and a half and watched many people leaving the store wearing jackets without being frisked. Palm Springs: A pharmacy demanded immigration documents from a customer and refused to fill a prescription. Glendale: A dental clinic asked for documents from a mother before providing service to her child. Los Angeles and San Francisco: Documented and undocumented pregnant women (some eight months pregnant) are afraid to go to a doctor for prenatal care. Santa Paula: A customer at a restaurant told the cook behind the counter that he wanted to see his green card. The customer said, "It's a citizen's duty to kick out illegals." Los Angeles: A Metro Transit Authority bus driver yelled at passengers and said they can no longer speak Armenian or Spanish on the bus.

187's Vigilante 'Enforcers,' *supra* at 19.

²⁵⁷ Daryl Bell, *Migrant's Slaying Fuels Suit*, SAN ANTONIO EXPRESS-NEWS, July 1, 2000, at 3B; Hegstrom, *supra* note 253, at A1; Nordwall, *supra* note 253, at 11A.

²⁵⁸ Bell, *supra* note 257, at 3B; Hegstrom, *supra* note 253, at A1; Nordwall, *supra* note 253, at 11A.

immigrants' greatest enemy is not the ranchers but the rough terrain they must cross in order to avoid the fortified areas of the border.²⁵⁹

Public service announcements on Mexican television warn of the dangers posed by the United States border, but immigrants continue to cross, induced by the opportunity for a better life for themselves and their families.²⁶⁰ Forced to alter their paths to more rural and rugged areas, they now confront dangerous terrain and hostile weather.²⁶¹ Heat exposure is the leading cause of migrant death, followed by drowning.²⁶² Border patrol agents have added the role of rescuer to their list of duties; many training in water-rescue techniques in an attempt to reduce the number of deaths.²⁶³ Thus, inconsistent border policies have thwarted border patrol agents' ability to guard the land by forcing them to focus on safety rather than prevention.²⁶⁴

Faced with the prospect of traversing through grim terrain while alluding border patrol agents, many migrants turn to smugglers for help crossing the border.²⁶⁵ The well-paid smugglers often compromise the

²⁵⁹ Fletcher, *supra* note 250, at A21.

²⁶⁰ Gregor, *Deadly*, *supra* note 251, at 1A; Linda Valdez, *A Compassionate Voice Arises on Border Policies*, ARIZ. REPUBLIC, Sept. 7, 2000, at B9 ("They died because they wanted one of the many jobs available to illegal immigrants in this land of plenty.").

²⁶¹ Ken Ellingwood, *California and the West; INS Chief Targets Risky Rural Crossings*, L.A. TIMES, Sept. 7, 2000, at A3 ("[A]rchitects of a nationwide border crackdown . . . expected that hostile terrain and deadly weather conditions in remote mountains and deserts along the 2,000-mile U.S.-Mexico frontier would act as a greater deterrent to illegal crossings than has been the case."); Goodstein, *supra* note 220, at 20 ("[M]ore than 600 people died on the whole border last year from exposure to heat or cold."); see also Arturo Salinas, *Activists Call for Stop to Immigrants' Deaths*, VENTURA COUNTY STAR, Sept. 4, 2000, at A3; Leonel Sanchez, *Migrant-rights Advocates Plan Desert Walk to Protest Deaths*, THE SAN DIEGO UNION-TRIB., Sept. 2, 2000, at B9:7; Ginger Thompson, *Danger Stalks Immigrants at Border*, PLAIN DEALER, August 5, 2001, at A1.

²⁶² Gregor, *Deadly*, *supra* note 251, at 1A (stating that heat exposure accounted for 136 casualties for the fiscal year ending September 30, 2000); Alison Gregor, *Effort Aims to Aid Immigrants; Border Agents Train to Stop River Tragedies*, SAN ANTONIO EXPRESS-NEWS, Sept. 14, 2000, at 8B [hereafter Gregor, *Tragedies*]. 89 migrants have died by drowning in 1998 and 1999. Gregor, *Tragedies*, *supra* at 8B. See also Tessie Borden, *Border Aircraft Save 2 in Desert*, THE ARIZ. REPUBLIC, July 13, 2000, at B2. Two immigrants suffering from heat exposure and dehydration drank their own urine to stay alive. Borden, *supra* at B2.

²⁶³ Gregor, *Tragedies*, *supra* note 262, at 8B.

²⁶⁴ Fletcher, *supra* note 250, at A21; Gregor, *Tragedies*, *supra* note 262, at 8B.

²⁶⁵ Ellingwood, *supra* note 261, at A10; *Man Accused of Hiding 78 Illegal Immigrants*, THE HOUS. CHRON., Nov. 1, 2000, at A32 (indicating that migrants from Brazil, Honduras, Guatemala, El Salvador, and Mexico paid between \$500 and \$10,000 for safe passage to Houston) [hereinafter *Hiding*]; Robert D. McFadden, *'Death Defying' Smuggling Attempt is Thwarted at the Border*, THE N.Y. TIMES, Feb. 1, 1999, at B6; *Smuggler Who Lead 25 Migrants*

228 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

migrants' safety by subjecting them to precarious conditions.²⁶⁶ They lead their followers through the hazardous desert, hide them under the frames of automobiles, engage in high-speed automobile chases, and desert them when confronted with trouble.²⁶⁷ The helpless migrants are then left, often in the desert, to fend for themselves without food or water.²⁶⁸ Thus, inconsistent border policies simply create further complications instead of preventing illegal immigration.

VI. A PROPOSED MODEL STATUTE TO SET A UNIFORM STANDARD

While Mexico's President, Vicente Fox, proposes an open border between Mexico and the United States, the economic disparity that exists between the two countries makes a completely open border impractical for the United States.²⁶⁹ However, a guest worker visa program would help the Mexican economy and make open borders a more proximate possibility.²⁷⁰ This program would increase the number of Mexican citizens able to work in the United States. At the same time, such a program would reduce the need for immigrants to cross the United States-Mexican border illegally, thus decreasing the need for a fortified southern border and allowing border patrol agents to be evenly placed along both borders. The result would be a more effective and efficient Border Patrol, simultaneously reducing the opportunity for terrorists and smugglers to enter via the Canadian border and the demand for migrant workers to illegally enter via the Mexican border.

into Storm Convicted, THE SAN DIEGO UNION-TRIB., Sept. 19, 2000, at B5 [hereinafter *Smuggler*].

²⁶⁶ Ellingwood, *supra* note 261, at A10 (relating the deaths of eight migrants who were led by a smuggler into the San Diego Mountains during a snowstorm); McFadden, *supra* note 265, at B6; *Smuggler*, *supra* note 265, at B5.

²⁶⁷ Ellingwood, *supra* note 261, at A10; *Hiding*, *supra* note 265, at A32; McFadden, *supra* note 265, at B6. A customs agent found four Chinese women wedged between plywood under a fish truck's frame on the New York-Canadian border. McFadden, *supra* note 265, at B6.

²⁶⁸ HARWOOD, *supra* note 2, at 18; *Smuggler*, *supra* note 265, at B5. A smuggler led 25 immigrants through the mountains of East San Diego County during a March snowstorm. *Smuggler*, *supra* note 265, at B5. One of the immigrants died of hypothermia after the smuggler deserted the immigrant who fell ill. *Id.*

²⁶⁹ David Dreier & M. Delal Baer, *Fox's Election Opens a Window of Opportunity with Mexico*, THE SAN DIEGO UNION-TRIB., Aug. 30, 2000, at B9:7; Susan Ferriss, *Fox Seeks New Solutions to Old Border Problems*, AUSTIN AMERICAN-STATESMAN, Aug. 20, 2000, at A1; Richard Ruelas, *Border Solution: Legalize It*, THE ARIZ. REPUBLIC, July 14, 2000, at B1 ("Fox said he wants an open border between the United States and Mexico within 10 years.").

²⁷⁰ Dreier & Baer, *supra* note 269, at B9:7; Ferriss, *supra* note 269, at A1; Ruelas, *supra* note 269, at B1.

This Note proposes a model statute to be adopted by the federal government.²⁷¹ As previously indicated, although federal law aims to provide consistent regulations throughout the country, it is applied inconsistently on the United States borders and is not narrowly tailored to congressional goals.²⁷² The result is ineffective control of illegal immigration.²⁷³ Furthermore, both immigrants and citizens suffer the consequences, and the policies create more problems than they solve.²⁷⁴ The proposed statute imposes uniform requirements on both the northern and southern borders of the United States in a manner that is narrowly tailored to congressional desire to prevent illegal immigration.²⁷⁵ It allows United States companies to bring immigrants into the country with a guest visa.²⁷⁶ Former employers must use legal channels to do their hiring, or forfeit their right to employ migrants for five seasons.²⁷⁷ Likewise, migrants will forfeit their right to obtain a guest visa for five seasons if they are caught circumventing the law.²⁷⁸

In essence, the new statute promotes strong accountability of both employers and migrants, creating an incentive to legally enter the country and eliminating the need to circumvent the law by increasing the amount of visas available.²⁷⁹ Under the proposed law, migrants will no longer have to traverse rugged and perilous paths, and smugglers will no longer be in demand. Employers also will have no need to violate the law by hiring undocumented migrants because the statute

²⁷¹ See *infra* Part VI (discussing the Model Statute).

²⁷² See *supra* Part II (discussing the inconsistent implementation of federal immigration law).

²⁷³ See *infra* Part IV.

²⁷⁴ See *supra* Parts IV and V.

²⁷⁵ See *infra* Part VI.

²⁷⁶ See *infra* Part VI.

²⁷⁷ This Note does not address the issues surrounding employers' abuse of illegal immigrants. By attempting to create a legal status for immigrant workers, the government can more easily regulate the employers. Nonetheless, health issues, especially, play a vital role in the undocumented worker's daily life. Although most employers now ensure that migrant workers leave the fields while toxic pesticides are sprayed, the workers' children are often left on the field and exposed to the toxins. See generally Jeanne M. Glader, Note, *A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and its Ramifications for Migrant Children*, 42 HASTINGS L.J. 1455, 1480 (1991) (providing examples of the health problems that children of migrant farmworkers face). A solution to this dilemma is beyond the scope of this Note.

²⁷⁸ The legal and social problems relating to migrant families is beyond the scope of this Note, but is definitely another aspect to be accounted for when drafting a temporary worker program.

²⁷⁹ See *supra* Part V.A (explaining the incentives for immigrants to cross the border legally).

230 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

takes into account employer demand and the role migrant workers play in satisfying that demand.²⁸⁰

Title 8: ALIENS AND NATIONALITY

Chapter 12: Immigration and Nationality

Subchapter II: Immigration

Section 1: Definitions

As used in this Chapter:

- (a) “Employer” means any individual, company, or business that has one or more employees, including, but not limited to, individuals, partnerships, associations, limited liability companies, and corporations.
- (b) “Migrant worker” means any foreign national seeking employment in the United States.
- (c) “Guest Visa” means an entry permit allowing migrant workers to immigrate to the United States for the purpose of employment with a specific employer to expire upon termination of employment.

Commentary

Section 1 clearly defines the statute’s material terms in order to ensure that all individuals and companies whom the statute effects will be aware of their duties. Employer is defined broadly and specifically, and includes all potential employers in the United States. The statute provides examples in order to plainly lay out the most common types of employers falling under its jurisdiction. Next, migrant worker is defined to include immigrants of all nationalities seeking employment in the United States. The model statute provides uniform access to the United States for immigrants of all nationalities through the guest worker visa program and provides examples of varied countries to whom the program applies to demonstrate that regardless of economic or political standing, countries must send their workers through the guest visa program. Finally, guest visa is defined to characterize the type of visa migrant workers must obtain under the program.

²⁸⁰ See *infra* Part VI (discussing the Model Statute’s recognition of employer demand of migrant workers).

Section 2: Guest Visa for Migrant Laborers

- (1) *A migrant worker shall be entitled to enter the United States under a Guest Visa, provided he or she has proof of employment with a United States company or citizen, the length of the stay to be determined by the length of employment.*

Commentary

Section 2(1) sets forth the concept of visa availability based on employer demand. Because immigrants cross the border in search of jobs and economic prosperity, employer demand is the factor that motivates their illegal entrance into the United States.²⁸¹ Absent an opportunity for income, most immigrants would not cross the border illegally.²⁸² Thus, the model statute allows the employer to determine whether an immigrant is eligible for a guest worker visa, effectively aligning the quota with demand.

- (2) *The number of Guest Visas will be determined by employer demand; no preset quota will be in place unless Congress determines that the unemployment rates command one.*

Commentary

Like eligibility for a visa, the quantity of guest visas will be determined by employer demand. Because migrants will continue to immigrate to the country as long as jobs are available, employers should be able to receive as many guest workers as they need.²⁸³ The statute increases the direct role of employers in the recruitment process, eliminating the red tape often involved in immigration.²⁸⁴ As a result,

²⁸¹ See *supra* Part V.A.

²⁸² See *supra* Part V.A.

²⁸³ H.R. REP. NO. 104-875, available at 1997 WL 10633 (1997); S. REP. NO. 104-249, available at 1996 WL 180026 (1996); Baer, *supra* note 241, at 96; Friedman, *supra* note 241, at 1723; Heppel & Torres, *supra* note 14, at 53; Medina, *Employer*, *supra* note 241, at 339; Guerra, *supra* note 241, at 1B; Hinojosa, *supra* note 241, at 7B.

²⁸⁴ CALAVITA, *supra* note 7, at 85-86. The *Bracero* Program proposed such a process but it was never implemented. *Id.* In Commissioner Swing's report to the inter-agency American Section of the Joint Commission on Mexican Migrant Labor in September 1954, he urged a greater consideration of the grower's needs in the *Bracero* Program, concluding:

The employment in the United States of Mexican laborers lawfully admitted temporarily for agricultural labor should be made as attractive as possible to employers and the employees by means such

232 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

employers will find the program more attractive than relying on government immigration procedures. It will give them the types and amount of workers that they need, making the process relatively simpler and more efficient.²⁸⁵ The statute will also reduce the desire to circumvent the law because employers will be able to legally hire seasonal, reliable, and inexpensive labor.²⁸⁶

Section 3: Requirements for employers to safeguard immigrant laborers

- (1) *Guest visa laborers shall not be paid less than domestic workers doing similar work and shall receive at least minimum wage.*

Commentary

Section 3(1) ensures that guest workers receive a competitive wage so that they may adequately live while working in the United States. The statute safeguards the rights of the workers by providing for fair wages. The statute also protects the domestic worker. By requiring the migrant workers to be paid the same as a similarly situated domestic worker, the statute prevents citizens from losing potential jobs to immigrants. As a result, hostility toward immigrants may also decrease when citizens are no longer threatened by their presence.

- (2) *Guest workers shall have the right to elect representatives, to discuss complaints and working conditions with their employers, and the representatives shall report the complaints to INS inspectors if unresolved to determine their validity without penalty of termination.*

Commentary

Section 3(2) provides a method by which immigrants can prevent exploitation by employers. It ensures that they have a means of voicing

as (a) giving the employers the types of workers they need in the amount needed, and precisely when needed; (b) making that process as simple as possible ...; (c) making the working and living conditions of these imported workers equal to (but not superior to) domestic workers in the same job.

Id.

²⁸⁵ *Id.*

²⁸⁶ Employers may be tempted to circumvent the law in order to avoid health regulation but as discussed *supra* note 277, by legalizing the immigrant's status, such abuses will be easier to regulate.

their objections. The Section aims to protect immigrants from violations that are prevalent in agricultural positions, such as unsafe working conditions and health violations caused by using dangerous pesticides. It will also provide immigrants with more incentive to enter the country via the guest worker visa because it offers a way for them to avoid the abuses of unmonitored employers.²⁸⁷ Employers will be unable to threaten immigrants with the loss of their jobs and continue their abuses since immigrants will have a means of reporting them.

Section 4 Taxation

Guest visa laborers shall pay taxes equal in amount to the taxes paid by domestic workers earning equivalent wages.

Commentary

Section 4 ensures that guest laborers contribute to the states' scheme of taxation. As a result, the guest laborers will be compensating the states in which they reside for any social services they receive during their stay in the United States. Furthermore, citizens will no longer resent the laborers because the laborers will be ostensibly benefiting the states instead of burdening them.

Section 5: Sanctions for failure to comply

- (1) *If an employer hires an immigrant illegally residing in the United States or fails to comply with the safeguards from the previous Sections, the employer will lose eligibility to employ guest visa laborers for a period of not less than five years.*

Commentary

Section 5(1) ensures that employers will not be tempted to hire an immigrant who is illegally residing in the country by revoking the privilege of employing a guest worker. Unlike current immigration law,

²⁸⁷ Glader, *supra* note 277, at 1480 ("Widespread health problems among migrant and seasonal farm-worker children include high infant mortality, below average height, upper respiratory infections, parasitic conditions, skin infections, chronic diarrhea, and vitamin A deficiency."); Fang-Lian Liao, Note, *Illegal Immigrants in Garment Sweatshops: The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, 3 Sw. J. L. & TRADE AM. 487, 497 (1996) ("A sweatshop is defined as a 'business that regularly violates both wage or child labor laws and safety or health regulations.'").

234 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36]

employers will have more to lose than to gain by violating the law.²⁸⁸ Although employers will likely be unhappy about paying legal migrant workers a minimum wage, they will be able to pass the cost to the consumers through increased prices. All employers in the same field will also increase their prices due to the minimum wage they will pay their workers. They will be unlikely to circumvent the law because losing their privilege to recruit and hire migrants will result in greater prices that will be uncompetitive when compared to similar businesses. As a result, employers will not gain more by violating the law and hiring illegal immigrants, and so will follow the law and hire temporary workers. Citizens may no longer feel at a competitive disadvantage, as immigrants will no longer carry the added benefit of accepting lower wages than the domestic worker.²⁸⁹ Additionally, employers will also lose the economic benefits of hiring immigrants for five years if they choose to violate the law, thus eliminating employer incentive to do so.²⁹⁰

- (2) *Any immigrant illegally residing in the United States shall lose eligibility for a Guest Visa for a period of not less than five years.*

Commentary

Section 5(2) subjects immigrants to the same standard as employers, thereby holding them accountable for violation of the law. Because both employer supply of jobs and immigrant demand are indispensable elements of the labor market, the statute requires responsibility from both.²⁹¹ Immigrants will be deterred from crossing the border illegally when faced with the prospect of being ineligible to work in the United States for five years. Like the employer, immigrants will have no incentive to violate the law because the costs outweigh the benefits, as opposed to current law. As long as there is employer demand, guest worker visas will be available, thus eliminating the desire for migrants to enter the United States without a visa. Legal jobs will be more desirable because they will be able to receive at least minimum wage, and employment abuses can be better monitored. Because the very reason

²⁸⁸ Medina, *Criminalization*, *supra* note 249, at 690.

²⁸⁹ Steven Greenhouse, *In U.S. Unions, Mexico Finds Unlikely Ally on Immigration*, N.Y. TIMES, July 19, 2001, at A1 (revealing that "the best way to prevent immigrants from undercutting American wages is to grant them legal status and unionize them").

²⁹⁰ CALAVITA, *supra* note 7, at 7; Dunne, *supra* note 14, at 639; Heppel & Torres, *supra* note 14, at 53.

²⁹¹ See *supra* Part V.A.

immigrants cross the border is the opportunity to achieve economic prosperity, they will not come to the country if no jobs are available.²⁹²

Section 6: Enforcement methods for failure to comply

- (1) *An employer has an affirmative duty to make a reasonable effort to review documentation from workers and determine its validity; the employer will be held liable for hiring an immigrant illegally present in the United States in bad faith.*

Commentary

Section 6(1) ensures that employers will be unable to circumvent the law by making a bad faith effort to check workers' documentation. IRCA's sanctions failed primarily because of its weak enforcement provisions, making it more profitable for employers to risk getting caught than to abide by the law.²⁹³ Employers only had to request documentation to avoid sanctions, regardless of whether the documentation was valid or invalid.²⁹⁴ The model statute eliminates the opportunity to avoid sanctions by bad faith efforts because it requires the employer to make a reasonable effort to determine the worker's actual eligibility rather than the apparent eligibility.

- (2) *Businesses will be subject to random and unannounced inspections by neutral federal investigators to ensure compliance with the above requirements.*

Commentary

Section 6(2) prevents investigators from giving employers advance warnings so that they may prepare for investigations and avoid sanctions for violation of the statute. An INS agency regulation that required investigators to give employers a three-day advance warning of inspections is partly responsible for IRCA's failure to effectively deter employers from hiring illegal immigrants, as employers could "clean up

²⁹² CALAVITA, *supra* note 7, at 1; Dunne, *supra* note 14, at 639; Heppel & Torres, *supra* note 14, at 53; Hing, *supra* note 14, at 82; Valdez, *supra* note 260, at B9.

²⁹³ CALAVITA, *supra* note 7, at 169-70.

²⁹⁴ *Id.*; Michael X. Marinelli, Note, *INS Enforcement of the Immigration Reform and Control Act of 1986: Employer Sanctions During the Citation Period*, 37 CATH. U. L. REV. 829, 837 (1988) ("This relieves the employer of the burden of becoming an expert in forged documents in order to avoid liability under the Act.").

236 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 36

shop" before the arrival of the INS.²⁹⁵ Random and unannounced inspections ensure that employers are always complying with the law because they risk inspection of their premises at anytime, thus risking the loss of the privilege to hire migrant workers and the economic advantages accompanying the privilege.

VII. CONCLUSION

By applying immigration law uniformly on both borders, the government can control entry into the United States more effectively and efficiently. Currently, the border policies have proved unsuccessful and inhumane.²⁹⁶ They treat similarly situated persons differently and have created significant equal protection concerns.²⁹⁷ These policies have also resulted in loopholes that encourage both employers and immigrants to circumvent the law.²⁹⁸ Immigrants flow to less patrolled areas and either cross the border, contributing to the growing number of undocumented migrants living in the United States, or losing their lives to treacherous and un-patrolled terrain.²⁹⁹ Employers, in turn, illegally hire the immigrants, finding it more cost-effective to break the law and pay penalties if they are caught.³⁰⁰ Furthermore, citizens must now live in a country that is home to many drug smugglers and terrorists that enter through holes in the porous border, surrendering national security in order to fortify the southern border.³⁰¹ As a result, such ineffective policies waste money and resources by creating more problems than they solve.³⁰²

This Note asserts that both immigrants and employers benefit from migrant labor, creating a constant incentive to circumvent the law. The

²⁹⁵ CALAVITA, *supra* note 7, at 169 ("Admitting that the warning allows employers to 'clean up shop' before the INS arrives, a senior immigration official in Washington explained that the purpose of the regulation was to avoid 'harassing' employers or interrupting business.").

²⁹⁶ See *supra* Parts IV and V.B (discussing immigration law's inhumane and unsuccessful application).

²⁹⁷ See *supra* Part III (discussing immigration law's equal protection concerns).

²⁹⁸ See *supra* Parts IV and V.A (discussing immigrant and employers' ability to circumvent the law).

²⁹⁹ U.S. Department of Justice, Immigration and Naturalization Service, *Illegal Alien Resident Population*, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm> (last visited June 30, 2001); see also Smith, *Criminal*, *supra* note 2, at 171; Tessier, *supra* note 21, at 212 ("Recent studies indicate that this number is growing by 200,000 to 300,000 people annually.").

³⁰⁰ CALAVITA, *supra* note 7, at 169.

³⁰¹ See *supra* Part IV.B (discussing the dangers to United States citizens).

³⁰² See *supra* Part V.B (discussing the consequences of ineffective immigration law).

model statute proposes that, by acknowledging the benefit, the federal government can more effectively control entry into the country and at the same time satisfy the needs of employers and immigrants. The statute allows immigrants to enter the country based on employer demand and creates sanctions for noncompliance and stricter enforcement methods, effectively protecting the interests of both United States citizens and immigrants. By respecting the welfare of both employers and immigrants, the United States will affirm its immigrant roots and successfully disinherit the storied pomp of ancient lands.³⁰³

Catherine E. Halliday*

³⁰³ 7 BRITANNICA, *supra* note 1, at 332.

* Sincere thanks to Bethany Rudd, Dr. John Halliday, Prof. Patricia Halliday, Brenna Halliday, and most especially, to my husband, Ron Roberts, for providing love and support during my research.

